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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1983

DIAMOND SHAMROCK CHEMICALS  
COMPANY, *et al.*,

*Petitioners,*

v.

MICHAEL F. RYAN, *et al.*,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE SECOND CIRCUIT

**PETITION FOR WRIT OF CERTIORARI**

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## Questions Presented

1. Can a federal transferee court, which for pretrial purposes presides over hundreds of personal injury actions based on diversity jurisdiction, bind all Vietnam War veterans and their families from the United States, Australia and New Zealand by certifying for trial a single, mass products liability class action where there are no common issues that predominate and no adequacy of representation?
2. Can that court ignore the due process requirements of *Eisen* by ordering media announcements in lieu of individual notice to absent class members who can be identified through reasonable efforts?

## Parties Below

The parties to the proceeding below, as required by Supreme Court Rules 21.1 and 28.1, are listed in the following footnote.\*

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\* Michael F. Ryan, Maureen Ryan, Kerry Ryan, Charlotte Blackmon, Orville E. Blackmon, Rebecca Blackmon, Brent Blackmon, Valerie Blackmon, Karen Blackmon, Carolyn Champion, Thomas B. Champion, Jr., Joy Champion, Dedrie Champion, George Ewalt, Sheila Ewalt, Tara Ewalt, David G. Lambiotte, Carol Quinn, Brian T. Quinn, Kevin Quinn, Dan G. Jordan, Donna Jordan, Chad Jordan, Michael Jordan, Earlie Robinson, Jr., Sheila Robinson, Michael Robinson, William Singley, Diane Singley, William Singley, Jr. and Steve Zardis; respondents.

The class of all persons who were in the United States, New Zealand or Australian Armed Forces injured while in or near Vietnam by exposure to Agent Orange or other phenoxy herbicides, including those compounds composed in whole or in part of 2,4,5-trichlorophenoxyacetic acid or containing some amount of 2,3,7,8-tetrachlorodibenzo-p-dioxin. The class also includes spouses, parents and children of the veterans born before January 1, 1984, directly or derivatively injured as a result of the exposure; respondents.

Diamond Shamrock Chemicals Company, petitioner. The parent company, subsidiaries and affiliates of Diamond Shamrock Chemicals Company are as follows:

Diamond Shamrock Holding Company, A.L.A. Chemicals Limited, ARC Technologies Systems B.V., ARC Technologies Systems Corporation, ARC Technologies Systems Licensing B.V., ARC Technologies Systems, Ltd., Agil Agroquimica Industrial Ltda., Amalgamated Curacao Patents Company N.V., Ancom Sdn. Berhad, Anglonor Limited, Anglonor S.A. Arkwright Chemicals Limited, Arkwright Chemie G.m.b.H., Carbochloro S.A. Industrias Quimicas, Chemby Chemicals Limited, DSAG Corporation, Dacral, S.A., Diamond Shamrock (Africa) (Pty) Ltd., Diamond Shamrock Alberta Gas Ltd., Diamond Shamrock (India) Ltd., Diamond Shamrock Italia S.p.A., Diamond Shamrock Polychem AB, Diamond Shamrock Trading Corporation, Diaspa S.p.A., Duolite International GmbH, Electrode Corporation, Eltech Electrosearch S.A., Eltech Research B.V., Eltech Resources B.V., Eltech Systems Corporation, Eltech Systems B.V., Eltech Systems International Sales Corp., Eltech Systems Limited—(Barbados), Eltech Systems Limited



—(Bermuda), Eltech Systems N.V., Hamada Agricultural Company Limited, Hawkeye Coal Company, Heraeus Elektroden GmbH, Herbitecnica Defensivos Agrícolas Ltda., Industrial Furnace Services, Inc., Inmuebles Industriales del Pacifico, S.A. de C.V., Insecticidas del Pacifico S.A. de C.V., Kolloid Chemie GmbH, Korea Potassium Chemical Co., Ltd., MDS Corporation, Magma Geysers, Inc., Muenzing Chemie GmbH, NEC Acquisition Co., NNA Trading Co., Natomas Company, Natomas Energy Company, Natomas Exploration of Canada, Ltd., Natomas (Far East) Limited, Natomas Financial Services, Inc., Natomas International Corporation, Natomas International Trading Co., Natomas International (U.K.) Limited, Natomas (Java) Limited, Natomas (Java Sea) Limited, Natomas (Kalimantan) Limited, Natomas Marine Sales, Inc., Natomas North America, Inc., Natomas of Australia, Inc., Natomas of Canada Ltd., Natomas Offshore Exploration, Inc., Natomas of Singapore, Inc., Natomas Overseas Finance N.V., Natomas Petroleum (Bahamas) Ltd., Natomas Petroleum International, Inc., Natomas Petroleum Oman, Inc., Natomas Petroleum Tunisia, Inc., Natomas Pipeline Company, Natomas Services, Inc., Natomas Trading Company, Neopur Limited, Neopur Technologien G.m.b.H., Nippon Dacro Shamrock Co., Ltd., Nopco Argentina S.A.I.C. y F., Nopco Colombiana S.A., Nopco Industrial S.A. de C.V., Parel Limited, Parel S.A., Permascand A.B., Permelec International, Ltd., Petroclor Limited, Polypren S.r.l., SDS Biotech Corporation, San Nopco Limited, Semilera del Noroeste S.A. de C.V., Seahorse Reinsurance Limited, Showa Diamond Chemical K.K., Sirotherm, Inc., Societe de Recherches Scientifiques N.V., Thai Diamond Shamrock Co., Ltd., Thermal Power Company, Tongue River Holdings, Inc., Transworld Egypt Petroleum Corporation, Transworld Petroleum Corporation, Transworld Petroleum (U.K.) Limited, Diamond Shamrock Corporation.

The Dow Chemical Company, petitioner. The parent company, subsidiaries and affiliates of The Dow Chemical Company are as follows:

Alamo Land Company, Inc., Compagnie des Services Dowell Schlumberger, Cordis Dow Corporation, Dow Banking Corporation, Dow Scandia Banking Corporation, Ltd., Dow Chemical Iberica S.A., Dow Corning Corporation, Dowell Schlumberger Corporation, El Dorado Terminals Company, Gruppo Lepetit S.p.A., Ivon Watkins-Dow Limited, Joliet Marine Terminal, Ecuatorianos LIFE, Long Beach Marine Terminal, Oronzio de Nora Impianti Elettrochimici S.A., Pacific Chemicals Berhad, Sinor Corradini Navarra S.A., Societe Industrielle de Plastic et de L'acier S.A., Technovast, The Cynara Company, The Kart-ridg Pak Co.

Hercules Incorporated, petitioner. The parent company, subsidiaries and affiliates of Hercules Incorporated are as follows:

Abieta Chemie G.m.b.H., A. C. Hatrick Chemicals Pty. Ltd., A. C. Hatrick (N.Z.) Ltd., Australian Chemical Holdings Limited, Ceratonia Sociedad Anonima, Companhia Brasileira de Productos Quimicos Bononia, Compano Lombarda S.r.l., Da-wood Hercules Chemicals Limited, DIC—Hercules Chemicals Inc., Erbamont N.V., Finance Company of Hercules Incorporated N.V., Genu Products Philippines Inc., Hercofina, Hercofina (Delaware), Hercofina Europe, Hercules Chemicals Australia Pty. Ltd., Hercules de Centroamerica S.A., Hercules France, S.A., Hercules Islands Corporation, Herdillia Chemicals, Ltd., Hercor Chemical Corporation, HIMONT Belgium N.V., HIMONT Canada, Inc., HIMONT Incorporated, HIMONT Italia, Sr.l., HIMONT Overseas Corporation, HIMONT U.S.A., Inc., Indian Gum Industries Ltd., Infinitics Incorporated, Japan Magnetics, Ltd., Lextar, NASCO International, Nelsons Acetate Limited, Neofil S.p.A., Pakistan Gum Industries, Ltd., Petrocel S.A., PPH—Companhia Industrial de Polipropileno, Polo—Industria E Comercio Ltda., Procedyne Corp., Quimproc S.A., Rika—Hercules K.K., St. Croix Petrochemical Corp., Societe Europeenne de Fibres et Composites, S.A., Sumika—Hercules Co. Ltd., Spurway Cooke Holdings Limited, T & C Chemicals (Pty.) Limited, Taiwan Hercules Chemicals Inc., Taiwan Polypropylene Co. Ltd., Taloquimia, S.A., Teijin Hercules Chemical Company Limited, Texas Alkyl Belgium S.A., Texas Alkyls, Inc.

Monsanto Company, petitioner. The parent company, subsidiaries and affiliates of Monsanto Company are as follows:

ACM Services, Inc., Advent Eurofund Limited, Agerquim, S.A. de C.V., Australian Fluorine Chemicals Pty. Limited, Biogen N.V., Collagen Corporation, Companhia Brasileira de Estireno (CBE), Companhia Brasileira de Plasticos Monsanto, Control Specialists (Proprietary) Limited, Daishin Kogyo K.K., Goyana, S.A. Industrias Brasileiras de Materias Plasticas (GOYANA), Hydrocarbon Products Pty. Ltd., Industrias Resistol, S.A. (IRSA), K.K. Astro-Gelande, Kibi Kasei K.K., Korag Company Limited, Korsil Company, Ltd., Mitsubishi Monsanto Chemical Company (MMK), Monsanto Chemicals of India Limited (MCIL), Monsanto (Malaysia) Sdn. Berhad (MONAYSIA), Nippon Cooper Kabushiki Kaisha, Nippon Fisher Company, Ltd., Plagon S.A.—Plasticos Goyana do Nordeste, Revertex Industries (Aust.) Pty. Ltd., Revertex Industries (N.Z.) Ltd., Revinex Australia Limited, Sankyo Kasei Sangyo K.K., Soperton Gum Market, Inc., Taiyo Kogyo Kabushiki Kaisha, 102957 Canada Limited, Titan Chemicals Limited.

T H Agriculture & Nutrition Company, Inc., petitioner. The parent company, subsidiaries and affiliates of T H Agriculture & Nutrition Company are as follows:

North American Philips Corporation, Daitom, Inc.

Thompson Chemical Company, respondent.

Uniroyal, Inc., respondent.

United States of America, respondent.

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IN THE  
**Supreme Court of the United States**  
October Term, 1983

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DIAMOND SHAMROCK CHEMICALS COMPANY, *et al.*,  
*Petitioners,*

v.

MICHAEL F. RYAN, *et al.*,  
*Respondents.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE SECOND CIRCUIT

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**PETITION FOR WRIT OF CERTIORARI**

Petitioners Diamond Shamrock Chemicals Company, The Dow Chemical Company, Hercules Incorporated, Monsanto Company, and T H Agriculture & Nutrition Company, Inc. respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on January 9, 1984 in *In re Diamond Shamrock Chemicals Company, et al.*, No. 83-3065.

**Opinions Below**

The order of the court of appeals denying a writ of mandamus to the Eastern District of New York appears in the Appendix at A1. No opinion was issued with that order, but the court's order states that an opinion will be forthcoming "in due course."

The order of the court of appeals recalling its mandate and reinstituting the stay of the district court's order pending petition for a writ of certiorari appears in the Appendix at A3.



The order of the court of appeals granting a stay of the district court's order pending determination of the mandamus petition appears in the Appendix at A5.

The opinion of the district court granting class certification and directing the form and content of class notice appears in the Appendix at A7.

### **Jurisdiction**

The judgment of the court of appeals was entered on January 9, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

### **Statutes and Rules**

Section 1407 of Title 28 of the United States Code appears in the Appendix at A159.

Rule 23 of the Federal Rules of Civil Procedure appears in the Appendix at A160.

### **Statement of the Case**

This dispute stems from the continuing controversy over the alleged health effects of Agent Orange and related herbicides used by the United States military in Southeast Asia during the Vietnam War.<sup>1</sup> Those herbicides were

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<sup>1</sup> Agent Orange was a 50:50 mixture of the n-butyl esters of 2,4-dichlorophenoxyacetic acid and 2,4,5-trichlorophenoxyacetic acid. The name "Agent Orange" derives from the orange band painted on the containers in which the herbicide was delivered to the government. Respondents' claims have focused on the allegedly harmful effects of minute quantities of 2,3,7,8-tetrachlorodibenzo-p-dioxin that may have been present in varying amounts in the herbicide. Unless the context requires otherwise, the term "Agent Orange" will refer collectively to the several formulations of phenoxy herbicides that contained any amount of 2,4,5-trichlorophenoxyacetic acid or 2,3,7,8-tetrachlorodibenzo-p-dioxin.

considered essential by the military to defoliate the dense vegetation that surrounded roads and other areas in order to protect American soldiers from ambush.

This proceeding is comprised of numerous actions filed in various state and federal courts which are now pending in the Eastern District of New York for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407 (1976), and has been designated as MDL No. 381. Jurisdiction in the transferee district court is based on diversity of citizenship under 28 U.S.C. § 1332.

The petitioners are the government contractors that manufactured Agent Orange. Respondents, members of a purported class of individuals that their counsel assert may number in the millions, include veterans of the armed forces of the United States, Australia and New Zealand who served in Vietnam at any time from 1961 to 1972, as well as their spouses, parents and children. The United States is also a defendant in certain MDL No. 381 cases brought by non-military personnel.

The veterans allege a great variety of personal injuries from exposure to Agent Orange, including numerous types of cancer, dermatological effects, neurological difficulties, gastrointestinal disturbances, impotence, and psychological and behavioral problems. Their children assert claims for genetic injuries and birth defects. Wives of veterans seek to recover in their own right for miscarriages and loss of consortium. Respondents, whose claims are governed by state law, advance various theories of liability, including common-law negligence, strict products liability, breach of implied warranty, intentional tort and nuisance. Punitive damages are also sought for petitioners' alleged misconduct in furnishing Agent Orange to the United States military.

Petitioners deny any causal connection between respondents' alleged injuries and Agent Orange, and have also raised a number of defenses recognized under various states' laws. These include, among others, statutes of limitations, contributory negligence, assumption of risk, misuse and the government contract defense.<sup>2</sup> Trial has been set to commence on May 7, 1984.

The specific issues on this petition relate to the class certification ruling of the district court under Rule 23 of the Federal Rules of Civil Procedure.

On December 16, 1983, the district court issued an order certifying a plaintiffs' class on all issues in these diverse proceedings under Rule 23(b)(3) in part because "a single class-wide determination on the issue of causation will focus the attention of Congress, the Executive branch and the Veterans Administration on their responsibility, if any, in this case" (A9).<sup>3</sup> The court defined the class to include all persons

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<sup>2</sup> While the parameters of the government contract defense have yet to be finalized by the court for purposes of trial, under a previous articulation of the defense any petitioner would be entitled to judgment if it could show that (1) the government established the specifications for Agent Orange; (2) the Agent Orange it manufactured complied with the specifications; and (3) the government knew as much as or more than a petitioner about the hazards to people that accompanied use of Agent Orange. 534 F. Supp. 1046, 1055 (1982). Subsequently the court ruled that issues of "general causation" and liability could not be tried separately from the government contract defense. 565 F. Supp. 1263. 1275-77 (E.D.N.Y. 1983).

<sup>3</sup> The court also granted class certification under Rule 23(b)(1) (B) with respect to claims for punitive damages. This conclusion was not based on a determination that a "limited fund" exists, but on the court's view that for policy reasons punitive damage awards must be limited (A24-27).

who were in the United States, New Zealand or Australian Armed Forces at any time from 1961 to 1972 who were injured while in or near Vietnam by exposure to Agent Orange or other phenoxy herbicides, including those composed in whole or part of 2,4,5-trichlorophenoxyacetic acid or containing some amount of 2,3,7,8-tetrachlorodibenzo-p-dioxin. The class also includes spouses, parents, and children of the veterans born before January 1, 1984, directly or derivatively injured as a result of the exposure.

In making its ruling, the court glossed over the prerequisites of Rule 23 without determining the typicality of the claims of the then undesignated class representatives. The court also ruled that the concept of "general causation"—or whether Agent Orange could have caused the injuries claimed—is a common question of sufficient significance that a determination would bind the absent class members (A14-15).

The court also determined that common questions of law predominate despite the fact that various respondents' claims are necessarily dependent upon the various states' laws governing products liability issues. This determination of predominance was based on the court's stated intention to define a "national consensus" law of products liability (A17).<sup>4</sup>

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<sup>4</sup> At an earlier stage in this litigation the district court ruled that a federal common law of products liability governed these actions and, therefore, that respondents' claims were maintainable under 28 U.S.C. § 1331. See 506 F. Supp. 737, 744 (E.D.N.Y. 1979). The court of appeals reversed that determination and this Court denied review. See 635 F.2d 987 (2d Cir. 1980), *cert. denied sub nom, Chapman v. Dow*, 454 U.S. 1128 (1981) (A116).

To inform potential class members of the action, the court ordered a three-part notice campaign that contemplates mailing individual notice to only certain of the putative class members even though a far greater number of persons are specifically identifiable.<sup>5</sup>

It also ordered dissemination of two forms of announcements to the general public in an attempt to notify other absent class members. Respondents' counsel were directed to request broadcast on network radio and television and to publish in a number of periodicals "special announcements" stating that all persons who believe they, or members of their families, were injured as a result of exposure to defoliants used by the military in Vietnam are members of the class. The announcements would also inform those persons to inquire for details about their rights, by either calling a toll-free number obtained by plaintiffs' counsel or writing to a post office box for information.<sup>6</sup>

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<sup>5</sup> The court directed plaintiffs' counsel to mail a copy of individual notice to: (i) all persons who have filed actions as plaintiffs in the district courts of the United States, or filed actions in state courts which were removed to federal court and transferred to the Eastern District of New York for consolidation under 28 U.S.C. § 1407; (ii) all persons who have moved to intervene; (iii) all persons presently represented by plaintiffs' counsel who have not commenced an action or sought intervention; and (iv) all persons who have listed their names on the "Agent Orange Registry" with the Veterans Administration (A29-30).

<sup>6</sup> The television "special announcements" are to be served upon ABC, CBS, NBC and the "Public Broadcasting and Television Networks." The radio "special announcements" are to be served upon stations with a combined coverage of at least 50% of the listener audience in each of the top 100 markets in the United States. "Newspaper and Magazine Notice" is to be published in periodicals distributed nationally in the United States, including *The New York Times*, *U.S.A. Today*, and *Time Magazine*, as well as in the ten largest newspapers in circulation in Australia, and the five largest newspapers in New Zealand (A30-32).

The district court stayed its order for seven days to afford petitioners time to seek review from the court of appeals. On December 22, 1983 petitioners filed in that court a petition for writ of mandamus and a motion to stay. A stay was issued on December 23, 1983 pending determination of the petition (A5). The court of appeals heard oral argument on January 4, 1984, and issued an order on January 9, 1984 denying the petition and vacating the stay (A1). The order was filed without opinion, but stated that one would be filed in "due course" (A2). Upon motion by petitioners, the court of appeals recalled its mandate on January 11, 1984 and issued an order under Rule 41(b) of the Federal Rules of Appellate Procedure reinstituting the stay through Sunday, January 15, 1984, pending application to this Court for a writ of certiorari (A3).

The instant petition was filed with the Clerk on January 15, 1984.

### **Summary of Argument**

By refusing to issue a writ of mandamus, the court of appeals has allowed to stand the district court's unprecedented decision which represents a sweeping distortion of Rule 23. The decision is directly contrary to holdings of this Court in *Eisen* and of all courts in other circuits that have ruled on these issues. There are no common questions of law or fact that predominate. The provisions for notice to absent class members are patently deficient and violate principles of due process.

The decision is not based on fundamental legal precepts but on broad considerations of policy that are more properly matters for congressional action. The court's complete disregard of due process requirements and the prerequisites of Rule 23 evidence the court's intention to certify a class at any cost.

## Reasons for Granting the Writ

### I.

#### **The Class Action Ruling Contravenes This Court's Holding in *Eisen* and Violates Principles of Due Process.**

In *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), this Court set forth the notice required under Rule 23:

[I]ndividual notice to identifiable class members is not a discretionary consideration to be waived in a particular case. It is, rather, an unambiguous requirement of Rule 23. As the Advisory Committee's Note explained, the Rule was intended to insure that the judgment, whether favorable or not, would bind all class members who did not request exclusion from the suit.

417 U.S. at 176. This Court rejected publication as a permissible substitute for individual notice where class members were reasonably identifiable. Thus, the Court held that comparing the teletype transactions of two odd-lot firms' computerized records with general-service brokerage addresses would be required to obtain the names and addresses of the two million putative class members in that action.

In the present case, the class action order disregards the mandate of *Eisen* requiring notice to the more than 2.4 million U.S. military personnel who, respondents' counsel assert, could be in the class.<sup>7</sup> Individual mailed notice has

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<sup>7</sup> This figure does not include the veterans' spouses, parents or children, or the members of the Australian and New Zealand armed forces or their families.

been ordered to only the approximately 120,000 persons who volunteered their names to the Veterans Administration for listing on the Agent Orange Registry, and to the 20,000 who have already filed actions, moved to intervene or otherwise retained counsel associated with plaintiffs' management committee. As to the remainder, the court has authorized a domestic media campaign based in large part on free radio and television announcements that it expects will be broadcast as a public service by miscellaneous radio and television stations throughout the United States.

Numerous other absent class members, however, are identifiable through reasonable effort. Edwin R. Matthews, counsel for defendant Thompson Chemical Company, submitted an affidavit to the court on January 29, 1981, summarizing sources from which a mailing list of hundreds of thousands of Vietnam veterans could readily be compiled by the representative plaintiffs (A152). In his affidavit, which is uncontroverted, Mr. Matthews points out, for example, that:

- (1) a computerized listing of all Vietnam veterans discharged after 1973 is available from the Veterans Administration (§ 2);
- (2) the states of Illinois, Louisiana, Michigan, Missouri, North Dakota, Pennsylvania, Washington and Wisconsin can provide lists of approximately 600,000 veterans who served in Vietnam (§ 10);
- (3) the Air Force Reserve Records Center can generate a list of 50,000 to 80,000 Vietnam veterans at a cost of under \$500 (§ 7);
- (4) the Navy can generate a list of approximately 134,000 Vietnam veterans at a cost not in excess of \$2,000 (§ 7); and



- (5) the Marine Corps can provide a list of the approximately 50,000 Marines currently on active duty who served in Vietnam (§ 7).

Yet respondents have not undertaken—and the district court has not required—any effort to verify or act on the information furnished in Mr. Matthews' affidavit more than two years ago.

In addition, the court has unilaterally rejected individual notice to the Australian and New Zealand class members without even inquiring into the feasibility of identifying those persons. The only provision for notice calculated to reach the Australian and New Zealand class members is publication of a written version of the truncated radio and television announcement in those nations' newspapers.

The notice provisions here do not meet this Court's mandate in *Eisen*. Moreover, the due process concerns underlying the "best notice practicable" requirement of Rule 23 will not be satisfied, thus creating the danger of successful collateral attack by class members on any judgment in favor of defendants. See *Eisen, supra*, 417 U.S. at 176. This Court has expressly recognized the unfairness of allowing a putative class member to secure the benefits of a class action without imposing the corresponding burden of accepting an adverse judgment. *Eisen, supra*, 417 U.S. at 177-78; *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 547 (1974). See also *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1207 (7th Cir.) (Stevens, J. dissenting) (a "procedure which permits a claim to be treated as a class action if plaintiff wins, but merely as an individual claim if plaintiff loses, is strikingly unfair"), *cert. denied*, 404 U.S. 991 (1971).

Here, the court purports to bind a large class of people, many of whom claim serious physical injury. Unlike the

situation in *Eisen*, the value of each individual claim is not *de minimis*. The effort to identify and properly notify those absent class members must, therefore, be greater than in *Eisen*, not less. See, e.g., *In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088 (5th Cir. 1977); *Payton v. Abbott Laboratories*, 83 F.R.D. 382 (D. Mass. 1979).

Absent binding notice to all class members, the most basic goal of class action litigation—expeditious resolution of all claims within one case—cannot be achieved. The court's failure to provide "the best notice practicable" in the present case will permit putative class members who have not opted out of the litigation to avoid the consequences of a determination unfavorable to the class because of the constitutionally infirm notice sanctioned by the court. This procedure will result in irreparable injury to petitioners.

## II.

### **The Class Action Ruling Conflicts With Decisions in Other Federal Circuits and Does Not Satisfy the Prerequisites of Rule 23.**

Rule 23 of the Federal Rules of Civil Procedure provides a vehicle that enables a single court to adjudicate numerous common claims by trying the cases of a few plaintiffs who fairly ensure the adequate representation of all. The binding effect of a single judgment on a number of persons achieves the "economies of time, effort, and expense" that are basic purposes of Rule 23. See Advisory Committee Notes to the 1966 Amendments, 39 F.R.D. 69, 103 (1966). The requirements in Rule 23 of typicality, adequacy of representation, predominance of common questions of law or fact, and notice to absent class members combine to ensure that class certification is granted only where, consonant with the

requirements of due process, the class can be bound and the preclusive effect of *res judicata* applied. *Hansberry v. Lee*, 311 U.S. 32 (1940); *Blackie v. Barrack*, 524 F.2d 891, 910-11 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976).

The federal courts, adhering to the above principles, have uniformly rejected efforts to certify classes under Rule 23 (b)(3) in mass tort cases involving latent diseases of multifactorial origins. In each instance, the court rejected the class action device because the disparate factual and legal questions that lie at the heart of such cases precluded classwide adjudication of claims or significant issues. *See, e.g., In re Northern District of California "Dalkon Shield" IUD Products Liability Litigation*, 693 F.2d 847 (9th Cir. 1982), *cert. denied sub nom. A.H. Robins, Inc. v. Abed*, —U.S.—, 103 S. Ct. 817 (1983); *Payton v. Abbott Labs*, Nos. 76-1514-S, *et seq.* (D. Mass., Oct. 3, 1983); *Delaney v. Borden, Inc.*, 99 F.R.D. 44 (E.D. Pa. 1983); *Mertens v. Abbott Laboratories*, 99 F.R.D. 38 (D.N.H. 1983); *Thompson v. Procter & Gamble Co.*, No. C-80-3711 (N.D. Cal., Dec. 7, 1982); *Ryan v. Eli Lilly & Co.*, 84 F.R.D. 230 (D.S.C. 1979); *McDaniel v. Johns-Manville Sales Corp.*, No. 76-735 (N.D. Ill., May 31, 1979); *Yandle v. PPG Industries, Inc.*, 65 F.R.D. 566 (E.D. Tex. 1974).

In *Dalkon Shield*, *supra*, the most recent court of appeals opinion on point, the Court of Appeals for the Ninth Circuit reversed certification of a statewide liability class under Rule 23(b)(3) and a nationwide punitive damages class under Rule 23(b)(1) comprised of individuals allegedly injured by the Dalkon Shield intrauterine device. In that case the court concluded that the "*inherent obstacles to personal injury class actions [whereby] commonality begins to be obscured by individual case histories*" precluded class

certification under Rule 23(b)(3). 693 F.2d at 852, 854 (emphasis added). The court noted that the "common nucleus of operative facts" relative to design and production could not support class-wide adjudication of liability:

In product liability actions, however, individual issues may outnumber common issues. No single happening or accident occurs to cause similar types of physical harm or property damages. *No one set of operative facts establishes liability. No single proximate cause applies equally to each potential class member and each defendant.* Furthermore, the alleged tortfeasors' affirmative defenses . . . may depend on facts peculiar to each plaintiff's case.

\* \* \*

Robins' overall liability, under some of the theories, cannot be proved unless each plaintiff also proves that Robins' breach of its duty proximately caused her particular injury.

*Id.* at 853, 856 (citation omitted) (emphasis added).

The court's class certification in this litigation stands in direct conflict with the decision in *Dalkon Shield*. Like *Dalkon Shield*, this mass products liability proceeding involves no one set of operative facts, no single proximate cause. Rather, Agent Orange and other herbicides were used in Vietnam over a period of ten years, from 1961 to 1971. Each veteran was exposed, if at all, to different herbicides, manufactured under varying processes by one or more of seven government contractors, at different times, in different places, for different lengths of time and in different concentrations.

The court of appeals has allowed circumvention of the due process concerns recognized in *Dalkon Shield* by condoning the unprecedented and purportedly distinct legal

concept of "general causation." Under this approach a jury would be asked to determine in the abstract, but in the factual context peculiar to the "representative" plaintiff, whether Agent Orange *could* cause injury to *any* class member under *any* circumstances. Thus, if it were found that a representative's injuries were (or were not) caused by Agent Orange, that conclusion, so the theory goes, would apply equally to all plaintiffs claiming "similar" injuries. The issue of legal causation, however, can not properly be addressed without thorough examination of each plaintiff's claimed exposure to Agent Orange as well as exposures and susceptibilities to other potential causes or cogenerators of the diseases alleged. Varied etiology makes extrapolation from one plaintiff to the class impossible, and renders a separate trial of "general causation" an exercise in futility.

No generalization regarding causation can be made from the examination of the causes of disease in one sentinel case. There is no scientific hypothesis that supports the selection of "representative" plaintiffs solely on the basis of the particular disease claimed. No common denominator of causation is identifiable here. See *Mertens v. Abbott Laboratories*, 99 F.R.D. 38 (D.N.H. 1983).

Had the court examined, as required under Rule 23, whether the representative plaintiffs' claims were typical of those of the class in order to ensure adequacy of representation, the house of cards upon which certification here is based would have fallen. Indeed, the numerous variations in exposure, medical and environmental history, as well as the myriad disparate diseases at issue, make it impossible for any class representative to "possess the same interest and suffer the same injury" as the class members. *Schlesinger v. Reservists Committee To Stop the War*, 418 U.S. 208, 216 (1974). *Accord, Malchman v. Davis*, 706

F.2d 426 (2d Cir. 1983); *Amswiss International Corp. v. Heublein, Inc.*, 69 F.R.D. 663, 667 (N.D. Ga. 1975).

Instead, consistent with its view of Rule 23 as an unbounded case control mechanism, the court dismissed the requirements of adequacy of representation and typicality in perfunctory fashion (A146-51). Yet, the class representatives were designated by respondents' counsel *after* certification (A15). The court acknowledged that there was no effort to address the typicality of the claims or adequacy of the representative plaintiffs (A146-51).

The court attempts to avoid application of the laws of the different states to the different class members' claims by positing an unspecified "national substantive rule" to govern the main issues in the litigation (A17). This "national rule" is to be based on a yet to be demonstrated, and in fact non-existent, "consensus" among the states with respect to the rules of conflicts and applicable substantive law. The court's decision represents a startling rejection of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941), and of the need to determine and apply the appropriate state's choice of law rules in order to ascertain the substantive law applicable to each claim. The "national substantive rule" envisioned by the court is little more than another term for the federal common law which the court of appeals has already determined does not govern here. See *In re "Agent Orange" Product Liability Litigation*, 635 F.2d 987 (2d Cir. 1980), *cert. denied sub nom. Chapman v. Dow Chemical Co.*, 454 U.S. 1128 (1981) (A116).

The court may not avoid application of those various states' substantive laws, including choice of law rules, simply by certifying these cases as a class action. Rule 23, a rule

of federal procedure, can not be employed consistent with *Erie* to effect a change in applicable state law. If the act of certifying a class in this mass tort litigation could properly reduce to a single rule the variety of choice of law determinations presented, then the predominance requirement of Rule 23 would be rendered meaningless. To hold otherwise would allow the *result* of certification to constitute the *prerequisite* of predominance. It is clear that the necessary application of the differing laws of perhaps fifty states and two foreign countries precludes class certification here. See, e.g., *In re Northern District of California "Dalkon Shield" IUD Products Liability Litigation*, 693 F.2d 847 (9th Cir. 1982), *cert. denied sub nom. A.H. Robins v. Abed*, — U.S. —, 103 S. Ct. 817 (1983); *Coca-Cola Bottling Co. v. Coca-Cola Co.*, 95 F.R.D. 168 (D. Del. 1982); *Schmidt v. Interstate Federal Savings & Loan Ass'n*, 74 F.R.D. 423 (D.D.C. 1977); *Elster v. Alexander*, 76 F.R.D. 440 (N.D. Ga. 1977), *appeal dismissed*, 608 F.2d 196 (5th Cir. 1979); *McMerty v. Burtness*, 72 F.R.D. 450 (D. Minn. 1976); *In re U.S. Financial Securities Litigation*, 64 F.R.D. 443 (S.D. Cal. 1974).

The court's attempt to contort what are essentially individual personal injury actions into a class action violates the due process safeguards incorporated in Rule 23. The trial of the representative plaintiffs' claims will accomplish little more than adjudication of those claims, and will have no significant effect on the claims of the thousands of other plaintiffs whose actions are included in this multidistrict litigation.

## III.

**Denial of Class Certification Will Not Preclude Fair Resolution of These Claims Which Involve Issues of Great Public Importance.**

The class certification determination here is predicated on the flawed premise that if this multidistrict proceeding does not proceed as a class action, respondents' claims may never be resolved. The fear apparently is that plaintiffs in the suits constituting MDL No. 381 will have no effective remedy without a class action. This simply is not so.

These proceedings do not present a situation where small claims need to be combined in order to provide an incentive to prosecute.<sup>8</sup> The very number of individual actions already initiated, as well as the amount of damages sought, amply demonstrates this.

In addition, federal adjudication of the subject claims may be accomplished without gerrymandering Rule 23 and denying the parties' due process rights. For example, 28 U.S.C. § 1407 was invoked effectively here to allow consolidated and coordinated pretrial proceedings. Other procedures exist to produce further efficiencies following remand to the transferor forums. *E.g.*, Fed. R. Civ. P. 42(a).

Moreover, Congress is actively engaged in addressing Agent Orange and related questions.<sup>9</sup> Besides proposed legislation aimed at resolving Agent Orange problems, Con-

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<sup>8</sup> *Cf. Eisen, supra*, 417 U.S. at 161 ("A critical fact in this litigation is that petitioner's individual stake in the damages award he seeks is only \$70.")

<sup>9</sup> *See, e.g.*, S. 374, 98th Cong., 1st Sess. (1983); S. 786, 98th Cong., 1st Sess. (1983); S. 991, 98th Cong., 1st Sess. (1983); H.R. 1135, 98th Cong., 1st Sess. (1983); H.R. 1961, 98th Cong., 1st Sess. (1983); H.R. 2017, 98th Cong., 1st Sess. (1983).



gress has acted to investigate and promote medical-scientific studies designed to determine the multifaceted issues of causation between Agent Orange exposure and alleged diseases.<sup>10</sup>

Both the court of appeals and the district court in MDL No. 381 have expressly acknowledged that Congress has a central role to play in regard to Agent Orange questions (A9, 131-32). Yet, the intention of the district court to supplant that role is evidenced by the court's treatment of Rule 23 and the requirements of *Eisen*, and by its espoused intention to apply federal common law under the rubric of "national consensus law." The magnitude of the class ruling raises a matter of grave public importance as it purports to affect individual rights on an international scale, well beyond the court's jurisdiction.

Since the early 1970's America has struggled to come to terms with its military involvement in Vietnam. The circumstances surrounding the use of herbicides in Vietnam has become one of the focal issues associated with that emotional period of American history. In addition, advances of scientific and medical technology have brought the Agent Orange and dioxin issues into the consciousness of the people of this country and the world.

The class ruling here would permit a single proceeding to adjudicate the personal injury claims of every Australian, New Zealander and American who alleges injury from Agent Orange by trying the claims of only a few persons

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<sup>10</sup> E.g., Veterans Health Programs Extension and Improvement Act of 1979, Pub. L. No. 96-151, Section 307, 93 Stat. 1092, 1097 (1979); Veterans' Health Care, Training, and Small Business Loan Act of 1981, Pub. L. No. 97-72, Section 401, 95 Stat. 1047, 1061 (1981); *Hearings Before the Senate Committee on Veterans' Affairs*, 98th Cong., 1st Sess. (June 16, 1983).

who do not adequately represent them. The necessity for review by this Court is compelling.

### Conclusion

For the reasons set forth above, petitioners respectfully pray that a writ of certiorari be granted to review the judgment of the Court of Appeals for the Second Circuit.

Dated: January 15, 1983

Respectfully submitted,

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## APPENDIX

Order of the Court of Appeals  
Filed January 9, 1984

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Docket No. 83-3065

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the ninth day of January, one thousand nine hundred and eighty-four.

Before

HON. JON O. NEWMAN,

HON. RALPH K. WINTER,

*Circuit Judges*

HON. LLOYD F. MACMAHON,

*District Judge*

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IN RE: DIAMOND SHAMROCK CHEMICALS COMPANY, THE  
DOW CHEMICAL COMPANY, MONSANTO COMPANY, HER-  
CULES INCORPORATED, and T.H. AGRICULTURE & NU-  
TRITION COMPANY, INC.,

*Petitioners.*

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IN RE: AGENT ORANGE,  
Product Liability Litigation

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On consideration of the petition for a writ of mandamus and further consideration of the order granting a stay pending determination of the petition for mandamus, it is

ORDERED that the said petition be, and it hereby is, denied; and it is further

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*Order of the Court of Appeals Filed January 9, 1984*

ORDERED that the said stay pending determination of the petition for mandamus be, and hereby is, vacated.

An opinion will be filed in due course.

A. DANIEL FUSARO, Clerk

by /s/ FRANCIS X. GINDHART  
Chief Deputy Clerk

Filed Jan. 9, 1984

**Order of the Court of Appeals  
Filed January 11, 1984**

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 83-3065

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In re

DIAMOND SHAMROCK CHEMICALS COMPANY, *et al.*,

*Petitioners*

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NOTICE OF MOTION

RELIEF REQUESTED:

A recall of this Court's order filed January 9, 1984 and reinstitution of stay is requested under Rule 41(b) pending application by petitioners to the Supreme Court for a writ of certiorari.

By: /s/ WENDELL B. ALCORN, JR.  
Wendell B. Alcorn, Jr.

FOR  
DIAMOND SHAMROCK CHEMICALS CO.  
Petitioner-Defendant

January 10, 1984

*Order of the Court of Appeals Filed January 11, 1984*

ORDER

Before:

HON. JON O. NEWMAN, CJ,  
RALPH K. WINTER, CJ,  
and  
LLOYD F. MACMAON, DJ.

IT IS HEREBY ORDERED that the motion to recall the mandate and reinstitute the stay previously granted by this court be and it hereby is granted. The said stay shall expire on January 15, 1984.

Filed Jan 11 1984

A True Cory  
A. DANIEL FUSARO, Clerk

A. DANIEL FUSARO, Clerk

/s/ EDWARD J. GUARDARO  
By: EDWARD J. GUARDARO  
Deputy Clerk

By /s/ FRANCIS X. GINDHART  
Chief Deputy Clerk

Filed Jan. 11, 1984



Order of the Court of Appeals  
Filed December 23, 1983

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 83-3065

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In re

DIAMOND SHAMROCK CHEMICALS COMPANY, *et al.*,

*Petitioners*

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NOTICE OF MOTION

RELIEF REQUESTED:

Petitioners request a stay of the Order of the District Court until such time as the Court of Appeals rules on their Petition for a Writ of Mandamus.

By: /s/ WENDELL B. ALCORN, JR.  
Wendell B. Alcorn, Jr.

FOR  
DIAMOND SHAMROCK CHEMICALS CO.  
Petitioner-Defendant

December 22, 1983

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*Order of the Court of Appeals Filed December 23, 1983*

ORDER

IT IS HEREBY ORDERED that the motion be and it hereby is granted.

Filed Dec 23 1983

/s/ THOMAS MICHAELS  
Thomas Michaels

**Opinion of the District Court (Weinstein, J.)**

**Dated December 16, 1983**

**UNITED STATES DISTRICT COURT**

**EASTERN DISTRICT OF NEW YORK**

**MDL No. 381**

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**In re "AGENT ORANGE"**  
**Product Liability Litigation**

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**MEMORANDUM AND PRETRIAL ORDER No. 72**  
**(Class Action)**

**APPEARANCES:**

David J. Dean, Dean, Falanga, Sinrod & Rose, Carle Place, New York; Stephen J. Schlegel, Schlegel & Trafelet, Ltd., Chicago, Illinois; Thomas W. Henderson, Pittsburgh, Pennsylvania; Benton Musselwhite, Houston Texas

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**Attorneys for Defendants**

**WEINSTEIN, Ch. J.:**

*Opinion of the District Court Dated December 16, 1983*

Plaintiffs, Vietnam War veterans and members of their families, claims to have suffered damages as a result of the veterans' exposure to herbicides in Vietnam. Defendants allegedly produced these herbicides.

Some years ago this court ruled that the litigation would proceed as a class action pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure. *In re Agent Orange Product Liability Litigation*, 506 F.Supp. 762, 787 ff. (E.D.N.Y. 1980). No certification order was, however, entered. The court noted that later stages of this litigation, especially those concerned with individual causation and damages, "may require reconsideration" of the certification. *Id.* at 790. Those later stages have now been reached.

The questions to be decided are whether the class should be certified, which of the types of classes described by Rule 23 should be utilized, how the class should be described, and for what issues. For the reasons indicated below, the class is certified for all issues under 23(b)(3), and on the issue of punitive damages under 23(b)(1)(B). This certification requires a number of decisions on the mechanics of notice described in the following discussion.

## INTRODUCTION

Plaintiffs have increasingly sought to use class actions to redress injuries caused by a single product manufactured for widespread use. A number of courts have seen the class action as the only alternative "to trying . . . virtually identical lawsuits, one-by-one," resulting in the "bankruptcy of both the state and federal court systems." Williams, *Mass Tort Class Actions*, 98 F.R.D. 323, 324 (1983). Three factors in the instant litigation make the desirability of class certification even greater than it would be in most mass tort litigation.

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The first is size. The potential size of plaintiffs' class in this litigation numbers in the tens of thousands. If the claims are dealt with individually, the result might "result in a tedium of repetition lasting well into the next century." *In re No. Dist. of Cal. "Dalkon Shield" IUD Product Liability Litigation*, 526 F.Supp. 887 (N.D. Cal.), *rev'd*, 693 F.2d 847 (9th Cir. 1982), *cert. denied sub nom. A. H. Robins v. Abed*, — U.S. —, 103 S.Ct. 817 (1983). By way of contrast, there were only several hundred plaintiffs in the class certified by the district court in *In re Federal Skywalk Cases*, 93 F.R.D. 415 (W.D. Mo.), *vacated*, 680 F.2d 1175 (8th Cir. 1982), *cert. denied sub nom. Johnson v. Stover*, — U.S. —, 103 S.Ct. 342 (1983) and less than 4,000 in the "Dalkon Shield" litigation.

Second is the need to assure that the financial burden will ultimately fall on the party which, it may be found, should as a matter of fairness bear it. As this court pointed out:

Overarching the entire dispute is a feeling on both sides that whatever existing law and procedures may technically require, fairness, justice and equity in this unprecedented controversy demand that the government assume responsibility for the harm caused our soldiers and their families by its use of Agent Orange in Southeast Asia.

*In re Agent Orange Product Liability Litigation*, 506 F.Supp. 762, 784 (E.D.N.Y. 1980). A class action is the best vehicle for achieving that end. A single class-wide determination on the issue of causation will focus the attention of Congress, the Executive branch and the Veterans Administration on their responsibility, if any, in this case. By contrast, possibly conflicting determination made over many years by different juries make it less likely that ap-

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propriate authorities and the parties will arrive at a fair allocation of the financial burden, if any.

Third, certification may encourage settlement of the litigation. In a situation where there are potentially tens of thousands of plaintiffs, the defendants may naturally be reluctant to settle with individual claimants on a piecemeal basis.

**LAW**

Rule 23(a) contains four prerequisites to the maintenance of a class action. They are:

(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims . . . of the representative parties are typical of the claims of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

The four prerequisites as they applied to this litigation have already been carefully analyzed by the court and found to exist. See *In re "Agent Orange" Product Liability Litigation*, 506 F. Supp. 762, 787 (E.D.N.Y. 1980). Present as well as prior counsel for plaintiffs appear adequate to their complex task. The only matter on which further elaboration is needed is the second prerequisite, the requirement that there be "questions of law or fact common to the class." Discussion of this point will be combined with a discussion of Rule 23(b)(3).

*Rule 23(b)(3)*

Rule 23(b)(3) states that if the four prerequisites of 23(a) are met, the class will be certified if, in addition,

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the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Thus, the issues to be decided are (1) do questions of law or fact common to the class predominate over any questions affecting only individual members, and (2) is a class action the best method for resolution of the litigation.

This court's prior finding that the government contract defense and the affirmative defense of misuse are common to the class is not contested by the parties. Defendants strongly contend, however, that the heart of any product liability claim, causation, can never be common to the class since each veteran, spouse and offspring who has instituted a lawsuit claiming direct or derivative injuries from the veteran's exposure to Agent Orange brings to this case a unique history upon which his or her claim for damages is predicated. Each veteran was exposed, if at all, at different times, at different places and under different circumstances. Therefore, the argument continues, a determination on the issue of causation, whether made as a finding of general causation or as a result of a finding in "test" cases, can never be dispositive of the claims of the other class members and as a result common questions do not "predominate."

Defendants support their argument by citing the Advisory Committee's Notes on Rule 23 and a number of recent cases that have denied (b)(3) certification in mass tort cases. See, e.g., *In re No. Dist. of Cal. "Dalkon Shield" IUD Product Liability Litigation*, 593 F.2d 847 (9th Cir. 1982), cert. denied sub nom. *A. H. Robins v. Abed*, — U.S. —, 103 S. Ct. 817 (1983); *Payton v. Abbott Labs*,

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Civil Action No. 76-1514-5, slip opinion (D. Mass. October 3, 1983) (DES Claims); *Boring v. Medusa Portland Cement Co.*, 63 F.R.D. 78 (M.D. Pa. 1974) (county residents seeking damages for air pollution); *Yandle v. PPG Industries, Inc.*, 65 F.R.D. 566 (E.D. Tex. 1974) (employees of asbestos plant).

Without setting forth the details and analysis of each case, it is fair to say that the reasoning of all of the cases they rely upon is the same as that of the Advisory Committee and is supportive of defendants' reasoning. The drafters' notes state:

A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class certification because of the likelihood that significant questions not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action nominally conducted as a class action would degenerate in practice into multiple lawsuits separately tried.

Advisory Committee Notes to Proposed Rules of Civil Procedure, 39 F.R.D. 69, 103 (1966). The defendants insist that the Agent Orange situation is even worse in that the focus of the litigation is not a "mass accident," but a mass products liability based upon a series of discrete events.

Following defendants' analysis, the District Court in Texas, in denying certification of a (b) (3) class consisting of all former employees and survivors of former employees of the defendant's asbestos plant, stated that the litigation

is very different from the single mass accident cases that have in the past allowed a class action to pro-



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ceed on the liability issues. Those cases have normally involved a single tragic happening which caused physical harm or property damage to a group of people, and affirmative defenses are absent. Usually, one set of operative facts will establish liability . . . The Court is in agreement with the defendant that there is not a single act of negligence or proximate cause which would apply to each potential class member and each defendant in this case.

*Yandle v. PPG Industries, Inc.*, 65 F.R.D. 566, 571 (E.D. Tex. 1974). Similarly, the District Court of New Hampshire denied (b) (3) certification to a class consisting of all New Hampshire women claiming injury from DES. Plaintiffs sought a blanket determination that DES causes injury *in utero*. The court stated that "such a determination [would] do nothing to advance the cause of class members as a group." *Mertens v. Abbott Laboratories* (D.N.H. July 27, 1983) C-80-223, slip opinion at 9. If the class is certified, defendants suggest that the certification and class trial should be limited to the only issue which they see as common to the entire class, that is, the government contract defense.

The force of the defense contention is substantial since commonality is critical to certification. Nevertheless, it is not conclusive. In deciding whether common questions predominate, a pragmatic evaluation of the interest of the class members is given great weight. As Professors Wright and Miller put it:

"In general, a Rule 23(b)(3) action is appropriate whenever the actual interests of the parties can be served best by a single action. . . . [T]he proper standard under Rule 23(b)(3) is a pragmatic one,

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which is in keeping with the basic objectives of the Rule 23(b)(3) class action. Thus, when common questions represent a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is a clear justification for handling the dispute on a representative rather than on an individual basis."

7A C. Wright & A. Miller, *Federal Practice and Procedure* §§ 1777, 1778 (1972). *See also id.* at § 1783. Wright & Colussi, *The Successful Use of the Class Action Device in the Management of the Skywalk Mass Tort Litigation*,—Univ. of Missouri-Kansas City L. Rev.—(1984) (forthcoming) (noting the successful use of a 23(b)(3) class in the *Skywalk* litigation). Litigation economies are also relevant. One commentator has gone so far as to suggest that "the chief purpose of the predominance inquiry is not to measure the compatibility of class action procedures with substantive law but to determine whether a class action will in fact realize any litigation economies." Note, *Developments in the Law—Class Actions*, 89 Harv. L. Rev. 1318, 1505 (1976).

Unlike litigations such as those involving DES, Dalkon Shield and asbestos, the trial is likely to emphasize critical common defenses applicable to the plaintiffs' class as a whole. They will include such matters as that the substances manufactured could not have caused the injuries claimed; that if any injuries were caused by defendants' product it was because of the particular use and misuse made by the government; and that the government, not the manufacturers were wholly responsible because the former knew of all possible dangers and assumed full responsibility for any damage. No "defenses to liability [are] present affecting the individuals in different ways." *Advisory Com-*

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*mittee Notes*, 39 F.R.D. at 103. It is anticipated that a very substantial portion of a prospective four-month trial will be devoted to just those defenses. Certification would be justified if only to prevent relitigating those defenses over and over again in individual cases.

Defendants' proposal to limit the class trial to the issue of the government contract defense is not a workable one. As this court has already noted, the issue of the government contract defense is inextricably interwoven with the issue of causation. *In re Agent Orange Product Liability Litigation*, 565 F. Supp. 1263, 1275-76 (E.D.N.Y. 1983). It would be impossible to try the former without litigating and reaching conclusions as to the latter.

Even more persuasive is the extraordinary size of plaintiffs' class and the posture of the dispute. Unlike a case such as *Mertens* or "*Dalkon Shield*", a determination on the issue of causation would do much to resolve the individual claims of the class members. The plaintiffs have indicated that there are a number of types of injuries which Agent Orange allegedly caused. The court has, therefore, ordered that, for purposes of the causation issue, plaintiffs' counsel will choose representative claimants for each type of injury alleged. A determination adverse to the plaintiffs in all categories could resolve the litigation and save considerable judicial and lawyers' time. Even if there is a finding of no causation as to less than all of the types of damage alleged, that determination alone would be likely to resolve tens of thousands of individual claims. *Cf. In re Antibiotic Antitrust Actions*, 333 F. Supp. 278, 281, *modified*, 333 F. Supp. 291; 333 F. Supp. 299 (S.D.N.Y. 1971).

Were there a finding of causation favorable too the plaintiffs across the board, that, too, will help resolve the

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individual claims of the class members. Unlike the asbestos, DES, Dalkon Shield, and *Federal Skywalk* cases, defendants contest liability not just as to individual members of the class, but as to any members of the class. Thus, unlike other mass product liability cases, a determination of general causation will serve both the interests of judicial economy and assist in the speedy and less expensive resolution of individual class member's claims. *Cf. Thompson v. Proctor & Gamble Co.*, No. C-80-3711 EFL (N.D. Cal. December 7, 1982), slip op. at 4; *Mertens v. Abbott Laboratories*, slip op. at 12. *See also* Note, Class Actions in a Products Liability Context—The Predomination Requirement and Cause-In-Fact, 7 Hofstra L. Rev. 859 (1979).

Finally, the court may not ignore the real world of dispute resolution. As already noted, a classwide finding of causation may serve to resolve the claims of individual members, in a way that determinations in individual cases would not, by enhancing the possibility of settlement among the parties and with the federal government.

The considerations already described make it clear why effective case management would not be possible were the court to pursue the alternative of allowing individual plaintiffs to intervene in a single case. A verdict in such a case either as to the affirmative defenses or causation might not be binding on the tens of thousands of plaintiffs not parties to the suit. A class action is, therefore, "superior to other available methods for the fair and efficient adjudication of the controversy."

Defendants further object that even if the litigation is otherwise suited for (b)(3) certification, the need to apply the law of dozens of different states would preclude certification or at least require different subclasses for each state. In most cases, this argument would have considerable

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force. As this court's opinions dealing with the choice-of-law problem in diversity cases and the law applicable to manufacturers' liability will show, it is of relatively little significance in this litigation. There is, as will be demonstrated, a consensus among the states with respect to the rules of conflicts and applicable substantive law that provides, in effect, a national substantive rule governing the main issues in this case. Since, in the main, one law applies to all the claims, certification of one class is appropriate. *Cf. In re No. Dist. of Calif. "Dalkon Shield" IUD Product Liability Litigation*, 693 F.2d 847, 850 (9th Cir. 1982), *cert. denied sub nom. A. H. Robins v. Abed.* — U.S. —, 103, S. Ct. 817 (1983).

Should there subsequently develop a need for creation of subclasses as the litigation develops and applicable substantive or procedural law requires application of individual states' laws, further subclasses can be created. *See, e.g., Halderman v. Pennhurst State School & Hospital*, 612 F.2d 84, 110 (3d cir. 1979), *rev'd on other grounds*, 451 U.S. 1 (1981); *Kaufman v. Dreyfus Fund, Inc.*, 434 F.2d 727, 737 (3d Cir. 1970); *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 566 (2d Cir. 1968); *In re Caesars Palace Securities Litigation*, 360 F. Supp. 366, 398 (S.D.N.Y. 1973).

The last objection the defendants have to (b)(3) certification is that a class-wide trial on causation violates their right to have a single jury rule on the question of the defendants' liability to each Agent Orange plaintiff. Issues may not be bifurcated for trial, they point out, unless it appears that the issues are "so distinct and separable" that they may be tried separately "without prejudice." *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 500, 501 (1931); *Franchi Construction Co. v. Combined Ins. Co.*, 580 F.2d 1, 8 (1st Cir. 1978). If the issues are so

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interwoven that separate trials would cause confusion and uncertainty, a litigant is denied his right of fair trial. As applied to the *Agent Orange* litigation, defendants contend that advising a jury in a subsequent trial on "specific" causation that there has already been a "general" determination that Agent Orange could cause plaintiff's illness would unfairly prejudice the jury in plaintiff's favor. Defendants' argument is not persuasive. It is common in product liability suits for there to be a tacit admission that the defendant's product *could* have caused the injury alleged with the question for the jury being whether it actually did cause it. Juries often distinguish between general and specific causation.

In sum, the court finds (1) that the affirmative defenses and the question of general causation are common to the class, (2) that those questions predominate over any questions affecting individual members, and (3) given the enormous potential size of plaintiffs' case and the judicial economies that would result from a class trial, a class action is superior to all other methods for a "fair and efficient adjudication of the controversy."

*Rule 23(b)(1)(A)*

Certification is sought pursuant to Rule 23(b)(1)(A). The rule requires a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class.

The court has already stated that "Rule 23(b)(1)(A) is not meant to apply . . . where the risk of inconsistent results in individual actions is merely the possibility that

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the defendants will prevail in some cases and not in others, thereby paying damages to some claimants and not others." 506 F. Supp. at 789 (citations omitted). If the risk of paying money damages to some and not others were sufficient for (b)(1)(A) certification, almost every class action could be certified under (b)(1)(A). See *McDonnell Douglas Corporation v. United States District Court, Central District of California*, 523 F.2d 1083, 1086 (9th Cir. 1975), cert. denied sub nom. *Flanagan v. McDonnell Douglas Corporation*, 425 U.S. 911 (1976); see also A. Miller, *An Overview of Federal Class Actions: Past, Present and Future* 43 (1973).

Plaintiffs attempt to distinguish the current litigation by expressing concern that if different courts decide differently future contractors will not know the possible extent of their responsibility and whether they should bid on government defense or war contracts. Their concern is commendable, but misplaced. Any inconsistent or erroneous theories of law applied by trial courts in Agent Orange cases will certainly be rectified in the highest courts. It is unlikely that the Supreme Court would avoid clarifying the law on the subject. Rule 23(b)(1)(A) is not applicable.

*Rule 23(b)(1)(B)*

Plaintiffs also seek certification of a mandatory class under Rule 23(b)(1)(B). Under that section, when the four prerequisites of 23(a) are met, the class will be certified if, in addition, as a practical matter, individual adjudications would prevent or greatly impede the ability of other members to protect their interests. It reads in part:

adjudications with respect to individual members of the class . . . would as a practical matter be dispositive of the interests of the other members not

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parties to the adjudications or substantially impair or impede their ability to protect their interests . . .

The rationale for using (b)(1)(B) in mass tort litigation is that of the "limited fund." As Professor Miller put the matter:

The paradigm Rule 23(b)(1)(B) case is one in which there are multiple claimants to a limited funds . . . and there is a risk that if litigants are allowed to proceed on an individual basis those who sue first will deplete the fund and leave nothing for latecomers.

A. Miller, *An Overview of Federal Class Actions: Past, Present and Future* 45 (1977).

As applied to mass tort litigation, the "limited fund" is generally construed to be the assets of the defendants as extended by insurance coverage and the assets of the insurers. The "fund" may also have a more limited bearing, as where the first judgments may take all of a limited punitive damage award. If earlier claimants proceed on an individual basis, it is urged, they will deplete the defendants' assets and leave nothing for later claimants. *See, e.g.*, Note, *Mechanical and Constitutional Problems in the Certification of Mandatory Multistate Mass Tort Class Actions under Rule 23*, 49 Brooklyn L. Rev. 517 (1983); Note, *Class Actions for Punitive Damages*, 81 Mich. L. Rev. 1787 (1983); Note, *Class Certification in Mass Accident Cases Under Rule 23(b)(1)*, 96 Harv. L. Rev. 1143 (1981).

Before determining whether to certify the plaintiffs' class under (b)(1)(B), two threshold questions must be addressed. The first is whether (b)(1)(B) should ever be applied in mass tort litigation. The second, assuming that



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it should, is what standard to use in determining whether there is a risk that earlier litigants will deplete the fund and leave nothing for latecomers.

Although the matter is not free from doubt, most courts that have considered the issue have concluded that, in the proper circumstances, Rule (b)(1)(B) may be used in mass tort cases. See, e.g., *Green v. Occidental Petroleum Corp.*, 541 F.2d 1335, 1340 n.9 (9th Cir. 1976); *Coburn v. 4-R Corp.*, 77 F.R.D. 43 (E.D. Ky. 1977), *petition for mandamus denied sub nom. Union Light, Heat & Power Co. v. United States Dist. Court*, 588 F.2d 543 (6th Cir. 1978), *cert. dismissed*, 443 U.S. 913 (1979); *Hernandez v. Motor Vessel Skyward*, 61 F.R.D. 558 (S.D. Fla. 1973). See also, Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problem of Fairness, Efficiency and Control*, 52 *Fordham L. Rev.* 37 (1983).

Two recent circuit courts reversed after certifications of a Rule (b)(1)(B) class in mass tort litigation. See "*Dalkon Shield*," 693 F.2d 847 (9th Cir. 1982); *Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir. 1982). Both courts recognized the applicability of (b)(1)(B) certification in mass tort cases. In "*Dalkon Shield*," the court stated that "[we] are not necessarily ruling out the class action tool as a means for expediting multi-party product liability actions in appropriate cases." 693 F.2d at 851. The court's decision was based largely on the fact that no plaintiff or defendant supported class certification. In *In re Federal Skywalk cases*, the court's decision was expressly based on the narrow grounds that the district court's certification violated the Anti-Injunction Act. 680 F.2d at 1183. Neither of the considerations apply here.

Courts that have considered the issue disagree over how to determine when the danger of fund exhaustion is great

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enough to justify certification. All conclude that "without more, numerous plaintiffs and a large ad damnum clause should not guarantee (b)(1)(B) certification." *Payton v. Abbot Labs*, 83 F.R.D. 382, 389 (D. Mass. 1979). The Ninth Circuit has held that (b)(1)(B) certification is proper only when "separate punitive damage claims necessarily will affect later claims." "*Dalkon Shield*," 693 F.2d at 852 (emphasis supplied). Strict adherence to the Ninth Circuit certainty standard would mean either the elimination of (b)(1)(B) certification in mass tort actions (which is the position at least one court has taken (see *Payton*, 83 F.R.D. 382, 389)), or require a pretrial determination on the merits, which the Supreme Court has frowned on in another class action context. See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974); cf. *Dolgow v. Anderson*, 438 F.2d 825 (2d Cir. 1971) (no minitrial on the merits). This strict Ninth Circuit standard flies in the face of the language of Rule 23, which requires only that there be a "risk" of impairment, not that there be a conclusive determination of impairment. See Note, *Class Certification in Mass Accident Cases Under Rule 23(b)(1)*, 96 Harv. L. Rev. 1143, 1158 (1983).

In *Coburn*, 77 F.R.D. at 46, one of three unreversed mass tort cases where (b)(1)(B) certification was actually granted, the court did not articulate what standard it was using, stating merely that it found a "risk" of impairment. Given the speculative nature of many of the rulings that must be made at the time of a class certification when the facts have not been fully developed, such as typicality of representative claims and adequacy of representation, the probable risk standard appears most useful.

How high the probability needs to be requires an evaluation of the advantages and disadvantages of class certifica-

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tion to the actual and prospective parties. We must, for example, remember that the court is in the position of protecting a large group of war veterans against the possibility that after possibly winning a long-sought after victory in the courts, they will not be able to collect on a judgment in their favor. Without now rehearsing all those effects, it is enough to say that considering the particular facts of the instant litigation, the proper standard is whether there is substantial probability—that is less than a preponderance but more than a mere possibility—that if damages are awarded, the claims of earlier litigants would exhaust the defendants' assets. Considering the needs and problems of parties aligned both as plaintiffs and defendants, the probability assessed at this time on the basis of limited information is somewhat less than 50 percent. The less-than-preponderance test is well recognized in procedural matters. *See, e.g., Rogers v. Missouri Pacific Railroad*, 352 U.S. 500, 509-10 (burden of coming forward in F.E.L.A. cases); *Fitzgerald v. A. L. Burbank & Co.*, 451 F.2d 670, 681 (2d Cir. 1971) ("reasonable probability" of employer's negligence in F.E.L.A. cases); *Bush v. United States*, 389 F.2d 485 (5th Cir. 1968) (in forfeiture case "less than prima facie legal proof . . . more than mere suspicion . . . reasonable under all the circumstances"); *United States v. One 1975 Lincoln Continental*, 72 F.R.D. 535, 540 (S.D. N.Y. 1976) ("probable cause" in forfeiture case); Note, F.E.L.A., Negligence and Jury-Trials-Speculation Upon a Scintilla, 11 *Wes. Res. L. Rev.* 123, 136 (1959) (interpretation supported by the "spirit of the statute"). *Cf. Calvert v. Katy Taxi, Inc.*, 413 F.2d 841 (2d Cir. 1969) (naked proof of collision enough to go to jury); Morgan & Maguire, *Cases and Materials on Evidence*, 1076-79, 1088-94, 1106-12 (7th ed. 1983); *United States v. Schi-*

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pani, 289 F. Supp. 43 (E.D.N.Y. 1968), *aff'd*, 414 F.2d 1296 (2d Cir. 1969), *cert. denied*, 397 U.S. 922 (1970); *United States v. Fatico*, 458 F. Supp. 388, *aff'd*, 603 F.2d 1053 (2d Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980).

To determine whether that substantial probability exists in this case, the Special Master, Sol Schreiber, was directed to conduct a limited evidentiary hearing. *Cf.* "*Dalkon Shield*," 693 F.2d at 852 ("the district court erred by ordering certification without . . . even a preliminary fact-finding inquiry concerning [the defendant's] actual assets, insurance, settlement experience and continuing exposure."). At the hearing, defendants' counsel submitted certified copies of their most recent balance sheets. The plaintiffs' counsel selected a cross-section of their cases and made a brief presentation as to the nature of the damage alleged. The Master found that the combined net assets of the defendants, including insurance, total approximately \$9 to \$16 billion. Collection of judgments, if any, would be spread over a number of years and payment could probably be handled from year-to-year and paid out of earnings. The Master also found that, based on the information presently available, his best estimate is that the number of claims may total 40,000 to 50,000. He concluded that the evidence now before the court does not support the view that provable claims will exhaust the defendants' assets.

The court has carefully reconsidered the Master's findings and all other information before the court. It is convinced that the risks as reasonably evaluated at this stage of the litigation allow (b)(1) certification on the issue of punitive damages only. The power of the court to certify the class under more than one section is not contested by the parties. *See Manual for Complex Litigation* § 1.43 (1982).

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Plaintiffs contend that the limited fund can be found here in one of two ways. First, they contend that compensatory damages will exceed the net worth of the defendants. Second, they contend that even if the compensatory damages do not satisfy (b)(1), punitive damages will.

As to their first contention, the information elicited at the hearing and in appearances before this court indicates that sufficient assets are and will be available to respond to any probable judgments. Without the aid of a full trial, on the basis of facts presently available, it cannot be said that there is a substantial probability that if plaintiffs' claims are successful, the compensatory recovery will exceed defendants' assets.

Based on information thus far supplied to the court, it also cannot be found, as a preliminary matter, that there is a substantial probability that punitive damages, if allowed will, when added to compensatory damages, exceed defendants' assets. Apart from the equivocal nature of the evidence on the claimed callous disregard by the defendants of the effect of their product, also militating against a trial on award on punitive damages is the fact that prejudicial evidence is likely to be introduced on the punitive damage issue. Finally, there may be a policy against substantial punitive damages in a case such as this. An award of huge punitive damages might discourage government contractors from bidding for defense contracts and manufacturing material vitally needed for the national defense and might "seriously impair" the government's "ability to formulate policy and make judgments pursuant to its war powers." *Sanner v. Ford Motor Co.*, 144 N.J. Super. 1, 364 A.2d 43 (1976), *aff'd*, 154 N.J. Super. 407, 381 A.2d 805 (1977), *cert. denied*, 75 N.J. 616, 384 A.2d 846 (1978).

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Evidence that the government had almost as much, if not more, knowledge of the dangers posed by Agent Orange, and control by the government of its use are among the additional factors that would argue against punitive damages. It would be unfair to punish the defendants while the government, which might be equally, or even more, culpable, avoided all liability. Finally, merely instructing the jury as to punitive damages may distort the juror perceptions and make the case even more difficult to control. *See Koufakis v. Carvel*, 425 F.2d 892, 905 (2d Cir. 1970).

Nevertheless, there is a substantial probability that limited punitive damages may be allowed. If they are, it would be equitable to share this portion of the possible award among all plaintiffs who ultimately recover compensatory damages. Yet, if no class is certified under Rule (b)(1)(B), non-class members who opt out under Rule 23(b)(3) would conceivably receive all of the punitive damages or, if their cases are not completed first, none at all.

It is axiomatic that the purpose of punitive damages is not to compensate plaintiffs for their injury, but to punish defendants for their wrongdoing. In theory, therefore, when a plaintiff recovers punitive damages against a defendant, that represents a finding by the jury that the defendant was sufficiently punished for the wrongful conduct. There must, therefore, be some limit, either as a matter of policy or as a matter of due process, to the amount of times defendants may be punished for a single transaction. *See, e.g., Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 838-42 (2d Cir. 1967); Putz & Astiz. *Punitive Damages Claims of Class Members Who Opt Out: Should They Survive?*, 16 U. San, Fran. L. Rev. 1, 18-40 (1981). At the very least, a trial court in passing on future claims may

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admit evidence as to the payment of prior awards which may be used by a jury to reduce an award to a party seeking additional punishment for the same misconduct. *See, e.g., State ex rel. Young v. Crookham*, 290 Or. 61, 618 P.2d 1268, 1272-73 (1980); Redden, *Punitive Damages*, § 4.8 (1980); Restatement (Second) of Torts, § 909 (1977); Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1195 (1931). There is, therefore, a substantial probability that "adjudication with respect to individual members of the class . . . would as a practical matter be dispositive of the interests of the other members not parties to the adjudication." Accordingly, a class of all those described as members of the (b)(3) class are also certified under (b)(1)(B). The (b)(1)(B) certification is for the award of punitive damages.

How this decision under (b)(1)(B) affects plaintiffs' rights to opt out under Rule (b)(3) need not be decided now. In the first place, it is not clear that any appreciable number of plaintiffs will exercise their right to opt out under (b)(3). Nor is it clear that any punitive damages will be awarded. Thus, it seems sensible to allow exercise of opt-out powers, with the ultimate effect of that decision to be left for resolutions on motion, full briefing and argument.

Assessment of possible damages is for the purpose of a class certification ruling only. It does not constitute a determination of what damages will be allowed after trial.

### CLASS DEFINITION AND NOTICE

There remain the questions of defining the class and notice to the class. The defendants' contention that the class as the court has defined it is unworkable because it is subjective ("all veterans who were injured . . . by ex-



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posure to Agent Orange") is a *non sequitur*. Subjectiveness does not affect the applicability of the class trial's findings to members of the class and it does not prejudice the defendants in any way. The class is, therefore, adequately defined and clearly ascertainable. *See Ihrke v. Northern States Power Company*, 459 F.2d 566 (8th Cir. 1972).

Federal Rule 23(c)(2) provides that, in a class action maintained under Rule 23(b)(3),

the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.

When members of the class can be identified through reasonable effort, individual notice is required; the expense of giving the notice must be paid by the plaintiffs. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974); *Abrams v. Interco, Inc.*, 83-715, slip op. at 6680 (2d Cir., September 28, 1983).

What is "the best notice practicable under the circumstances" and what constitutes "reasonable effort" is a determination of fact to be made in the individual litigation. *In re Franklin National Bank Securities Litigation*, 599 F.2d 1109 (2d Cir. 1978); *see also In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088, 1098 n.11 (5th Cir. 1977) (and cases cited therein); C. Wright & A. Miller, *Federal Practice & Procedure*, at § 1786; *Manual for Complex Litigation*, § 1.45 (1982).

Accordingly, it is ORDERED:

1. Certification of this matter as a class action under Federal Rule of Civil Procedure 23(b)(3) is granted. Judge Pratt's decision certifying the class action status of



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this litigation under Rule 23(b)(3) is modified and confirmed. Plaintiffs' motion seeking certification under Rule 23(b)(1)(B) is granted only with respect to the claim for punitive damages.

2. The plaintiff class is defined as those persons who were in the United States, New Zealand or Australian Armed Forces at any time from 1961 to 1972 who were injured while in or near Vietnam by exposure to Agent Orange or other phenoxy herbicides, including those composed in whole or in part of 2,4,5-trichlorophenoxyacetic acid or containing some amount of 2,3,7,8-tetrachlorodibenzo-p-dioxin. The class also includes spouses, parents, and children of the veterans born before January 1, 1984, directly or derivatively injured as a result of the exposure.

The definition does not imply a conclusion that anyone within the class was injured as a result of exposure to any herbicide.

3. Notice to the members of the class shall be provided as follows:

(a) Plaintiffs' counsel, at their own expense, shall cause a copy of the written notice, attached as Exhibit A, to be mailed by first class United States mail to all persons who have filed actions as plaintiffs in the District Courts of the United States, or filed actions in state courts later removed to a federal court, which are pending in or have been transferred to this court for consolidated proceedings by the Panel on Multi-District Litigation, together with all persons who have moved to intervene or are intervenors, and each class members presently represented by counsel associated with plaintiffs' management committee who has not yet commenced an action or sought intervention. Mailing of the notice shall take place within 30 days of this Order.

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(b) Plaintiffs' counsel, at their own expense, shall cause to be mailed a copy of the written notice to all persons who are currently listed on the United States Government's Veteran's Administration "Agent Orange Registry." This mailing shall take place within 50 days of this Order.

(c) Notice shall be mailed in envelopes that are printed only with the names of the addressee and the Clerk of this Court. Plaintiffs' counsel shall maintain a record of the name and address of each person to whom the notice is mailed. The record shall be filed with the Clerk of the Court not later than 70 days after the issuance of this Order.

(d) Plaintiffs' counsel, at their own expense, shall obtain a post office box in Smithtown, New York, 11787, in the name of the Clerk of the Court, and advise the court and the parties of the box number not later than 15 days after the issuance of this Order. The box shall be rented until further order of the court. Plaintiffs' counsel shall on a daily basis review the contents of the post office box and prepare a listing of all exclusion requests received, which shall be available to the court and the parties for inspection and copying, together with the exclusion requests. Plaintiffs' counsel shall send a copy of the notice and the exclusion request form to each person who writes to the Clerk of the Court requesting them. Each day plaintiffs' counsel shall transmit to the court and the parties copies of any communications (other than exclusion requests or requests for forms) that are received at the post office box. Plaintiffs' counsel shall maintain a record, together with the originals, of all mail returned as undelivered.

(e) Plaintiffs' counsel, at their own expense, shall serve a radio and television announcement notice in the form of Exhibit B on the nationwide networks of the American

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Broadcasting Company, the Columbia Broadcasting System, the Mutual Broadcasting System, the National Broadcasting Company, and the Public Broadcasting and Television Networks and on radio stations with a combined coverage of at least 50 percent of the listener audience in each of the top one hundred radio markets in the United States within 50 days of this Order.

Along with the radio and television notice served upon the nationwide radio and television broadcasting systems and radio stations, plaintiffs' counsel shall request that the notice be read as set forth in Exhibit B without interruption or comment, either alone or in conjunction with the showing on television of the text of Exhibit B. Plaintiffs' counsel shall request that each participating radio and television broadcasting station advise them of the dates and times at which the notice was broadcast or shown.

Within 90 days of this Order, plaintiffs' counsel shall furnish to the court and the parties a report identifying the name and location of each radio station broadcasting the announcement, if known, and the date and time of each announcement. The court will then determine if further notice is required.

(f) Plaintiffs' counsel, at their own expense, shall publish in the following newspaper and magazines an announcement in two successive weeks (but if publication is monthly, only once) in the form of Exhibit C: the nationwide edition of *The New York Times*, *U.S.A. Today*, *Time Magazine*, the *American Legion Magazine*, *VFW Magazine*, *Air Force Times*, *Army Times*, *Navy Times*, and the *Leatherneck*; the ten largest circulation newspapers in Australia, including *The Australian*; and the five largest daily circulation newspapers in New Zealand, including *The Dominion*. Publication shall be completed as soon as practicable, but

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no later than March 1, 1984. The size of the notice shall be not less than one-eighth, nor more than one-third, of the newspaper or magazine page.

(g) Plaintiffs' counsel shall, at their own expense, obtain a toll-free "800" telephone number in the name of the Clerk of the Court. The number shall be in effect no later than January 1, 1984 to at least May 1, 1984. The number shall be manned on a daily basis, from at least Monday to Friday, 9:00 a.m. to 5:00 p.m., E.S.T., with knowledgeable persons (or a recorded announcement and recording device) who shall tell callers where to write for further information, but who shall not give advice concerning rights and responsibilities in this litigation. A record of those calling and giving their names and addresses shall be kept. Those requesting a copy of Exhibit A shall be sent one. No oral exclusion request shall be taken. Plaintiffs' counsel shall give written instructions to those answering the phone. A copy of such instructions and any recorded announcement shall be filed with the Clerk.

(h) The Clerk of the Court shall send this order and notice to the Governor of each of the states of the United States. He shall respectfully request each Governor to refer the notice to any state organization created by the executive or legislative branches dealing with the problems of Vietnam veterans and request that the notice be sent to all those known Vietnam veterans who may be members of the class described in the Order, or that a list of names and addresses be supplied to this court so that notice may be mailed by the plaintiffs' counsel. The Clerk shall respectfully request a list of those to whom notice has been sent by any state agency.

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(i) The notice provided for in this Order is the best reasonable and practicable notice under the circumstances of this litigation.

This Order is stayed for seven days to permit an application for a further stay to the Court of Appeals.

So Ordered.

/s/ JACK B. WEINSTEIN  
Chief Judge  
United States District Court  
Eastern District of New York

DATED: Brooklyn, New York  
December 16, 1983

*Opinion of the District Court Dated December 16, 1983*

EXHIBIT A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

MDL No. 381

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In re "AGENT ORANGE"  
Product Liability Litigation

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LEGAL NOTICE TO CLASS MEMBERS OF  
PENDENCY OF CLASS ACTION

This notice is given to you pursuant to an Order of the United States District Court for the Eastern District of New York and Rule 23(c)(2) of the Federal Rules of Civil Procedure. It is to inform you of the pendency of a class action in which you may be a member of the class, and of how to request exclusion from the class if you do not wish to be a class member. None of the claims described below have been proven. It is contemplated that a trial by court and jury will take place in this court beginning in May, 1984.

1. There are now pending in the United States District Court for the Eastern District of New York claims brought by individuals who were in the United States, New Zealand, or Australian Armed Forces assigned to or near Vietnam at any time from 1961 to 1972, who allege personal injury from exposure to "Agent Orange" or other phenoxy herbicides, including those composed in whole or in part of 2,4,5-trichlorophenoxyacetic acid or containing some amount of 2,3,7,8-tetrachlorodibenzo-p-dioxin (collectively referred to as "Agent Orange").

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2. The plaintiffs include spouses, parents, and children born before January 1, 1984, of the servicepersons who claim direct or derivative injury as a result of exposure. Plaintiffs include children asserting claims in their own right for genetic injury and birth defects caused by their parents' exposure to "Agent Orange" and other phenoxy herbicides. Wives of veterans exposed to "Agent Orange" in Vietnam seek to recover in their own right for miscarriages. Plaintiffs' theories of liability include negligence, strict products liability, breach of warranty, intentional tort and nuisance. Damage claims of family members include pecuniary loss for wrongful death, loss of society, comfort, companionship, services, consortium, guidance and support. In addition, plaintiffs seek punitive damages for defendants' alleged misconduct in furnishing herbicides to the United States Government.

3. The defendants, who are alleged to have manufactured or sold "Agent Orange" to the United States Government, are Dow Chemical Company, Monsanto Company, T. H. Agriculture & Nutrition Company, Inc., Diamond Shamrock Chemicals Company, Uniroyal, Inc., Hercules Incorporated, and Thompson Chemical Corporation. All the defendants deny that the plaintiffs' alleged injuries were in any way caused by "Agent Orange." They assert that injury, if any, was not caused by a product produced by them. The defendants have challenged these suits on various other grounds including plaintiffs' lack of standing to sue, lack of jurisdiction, statutes of limitation, insufficiency in law, plaintiffs' contributory negligence, and plaintiffs' assumption of known risks. Each has also asserted such affirmative defenses as the "government contract defense" and the Government's misuse of its product. In third-party complaints, the defendants asserted claims against the

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United States of America seeking indemnification or contribution in the event the defendants are held liable to the plaintiffs. The Government has asserted its power to prevent anyone from suing it.

4. The court has certified a class action in this proceeding under Rule 23(b)(3) of the Federal Rules of Civil Procedure. The plaintiff class consists of those persons who were in the United States, New Zealand, or Australian Armed Forces assigned to Vietnam at any time from 1961 to 1972 who were injured while in or near Vietnam by exposure to "Agent Orange" or other phenoxy herbicides including those composed in whole or in part of 2,4,5-trichlorophenoxyacetic acid or containing some amount of 2,3,7,8-tetrachlorodibenzo-p-dioxin. The class also includes spouses, parents, and children born before January 1, 1984, directly or derivatively injured as a result of the exposure.

The court may reconsider this decision, by decertifying, modifying the definition of the class, or creating subclasses in the light of future developments in the case. The definition does not imply a conclusion that anyone within the class was injured as a result of exposure to any herbicide.

5. The court has also certified a Rule 23(b)(1)(B) class limited to claims for punitive damages. The class includes the same persons as are in the Rule 23(b)(3) class. The court has decided not to permit members of the class to seek exclusion on the issue of punitive damages. You will therefore be bound by the court's rulings on punitive damages whether or not you seek exclusion on the issue of compensatory damages.

6. Trial of the representative plaintiffs' claims is scheduled to commence before Jack B. Weinstein, Chief Judge of the United States District Court for the Eastern District of New York, and a jury on May 7, 1984.



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7. If you are a member of the plaintiff class you will be deemed a party to this action for all purposes unless you request exclusion from the Rule 23(b)(3) class action covering compensatory damages.

8. If you do not request exclusion from the class by May 1, 1984, you will be considered one of the plaintiffs of this class action for all purposes. You may enter an appearance through counsel of your own choice. You will be represented by counsel for the class representatives unless you choose to enter an appearance through your own legal counsel.

9. Class members who do not request exclusion will receive the benefit of, and will be bound by, any settlement or judgment favorable to the class covering compensatory damages. The class representatives' attorneys fees and costs will be paid out of any recovery of compensatory and other damages obtained by the class members. You will not be charged with costs or expenses whether or not you remain a member of the class. However, if you choose to enter an appearance through your own legal counsel, you will be liable for the legal fees of your personal counsel.

10. Class members who do not request exclusion will be bound by any judgment adverse to the class, and will not have the right to maintain a separate action even if they have already filed their own action.

11. If you wish to remain a member of the class for all purposes, you need do nothing at this stage of the proceedings.

12. *If you wish to be excluded from the class for compensatory damages, you must submit a written request for exclusion.* For your convenience, the request for exclusion

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may be submitted on the attached form, entitled "Request for Exclusion." If you received this notice by mail, a Request for Exclusion form should have accompanied it. If you did not receive a Request for Exclusion form, you may obtain a copy by writing to the Clerk of the Court, P.O. Box —, Smithtown, New York 11787. A written Request for exclusion may be submitted without using the Request for Exclusion form, but it must refer to the litigation as "in re 'Agent Orange' Product Liability Litigation, MDL No. 381"; include your name and address in your statement requesting exclusion. Any request for exclusion must be received on or before May 1, 1984 by the Clerk of the United States District Court for the Eastern District of New York at Post Office Box—, Smithtown, New York, 11787 or at a federal courthouse in the Eastern District of New York.

13. Under the court's Order, all potential plaintiffs are deemed to be members of a Rule 23(b)(1)(B) class on the issue of punitive damages. At the time of trial the court will determine whether the facts presented warrant the submission of a punitive damage claim to the jury. In the event that there is a recovery for punitive damages, it will be shared by those plaintiffs who are successful in prosecuting their claims in this or other suits on an appropriate basis to be determined by the court. If you choose to exclude yourself from this class action on the issue of compensatory damages, you may do so without necessarily losing your right to share in any punitive damages.

14. The plaintiffs in this class action are represented by a group of attorneys who have been tentatively approved by the Court as the Agent Orange Plaintiffs' Management Committee. Members of this committee include:

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Phillip E. Brown, Esq.  
Hoberg, Finger, Brown, Cox & Molligan  
703 Market Street (18th Floor)  
San Francisco, California 94103

Stanley M. Chesley, Esq.  
Waite, Schneider, Bayless and Chesley Co. L.P.A.  
1513 Central Trust Tower  
Fourth and Vine Streets  
Cincinnati, Ohio 45202

David J. Dean, Esq.  
Dean, Falanga & Rose  
One Old Country Road  
Carle Place, New York 11514

Thomas W. Henderson, Esq.  
Baskin & Sears  
Frick Building (10th Floor)  
Pittsburgh, Pennsylvania 15219

Benton Musselwhite, Esq. &  
John O. O'Quinn, Esq.  
609 Fannin (Suite 517)  
Houston, Texas 77002

Stephen J. Schlegel, Esq.  
Schlegel & Trafelet, Ltd.  
One North LaSalle Street  
Suite 3900  
Chicago, Illinois 60602

Newton B. Schwartz, Esq.  
Houston Bar Center Building  
723 Main (Suite 325)  
Houston, Texas 77002

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David J. Dean, Esq. has been designated by the court as plaintiffs' spokesman. The Management Committee is being aided in its duties of representing the interests of the plaintiffs by other law firms in the United States and abroad.

15. *Examination of pleadings and papers.* This notice is not all inclusive. References to pleadings and other papers and proceedings are only summaries. For full details concerning the class action and the claims and defenses which have been asserted by the parties, your or your counsel may review the pleadings and other papers filed at the office of the Clerk of the United States District Court for the Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York 11201, on any business day from 9:00 a.m. to 5:00 p.m.

16. *Interpretation of this Notice.* Except as indicated in the order and decisions of the United States District Court for the Eastern District of New York, no court has yet ruled on the merits of any of the claims or defenses asserted by the parties in this class action. This notice is not an expression of an opinion by the court as to the merits of any claims or defenses. This notice is being sent to you solely to inform you of the nature of the litigation, your rights and obligations as a class member, the steps required should you desire to be excluded from the class, the court's certification of the class, and the forthcoming trial.

Robert C. Heinemann  
Clerk, United States District Court  
for the Eastern District  
New York

DATED: Brooklyn, New York  
January 12, 1984

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**EXCLUSION REQUEST FORM**

Clerk  
United States District Court  
for the Eastern District of New York  
P.O. Box —  
Smithtown, New York 11787

Re: In re "Agent Orange" Product Liability  
Litigation MDL No. 381

I hereby request to be excluded from the class action in  
the above-captioned matter.

.....  
(signature)

Name (print): .....

Address: .....

.....  
If not a member of the armed forces who served in  
or near Vietnam, how are you related to such a  
serviceperson? .....

.....  
Armed forces unit of serviceperson .....  
Armed forces identifying number of serviceperson

.....  
Period of service in or near Vietnam .....

.....  
I learned about this suit by .....

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Exhibit B (Radio and Television Communication)

SPECIAL ANNOUNCEMENT

Were you or anyone in your family on military duty in or near Vietnam at any time from 1961 to 1972? If so, listen carefully to this important message about a pending "Agent Orange" lawsuit that may affect your rights.

If you or anyone in your family claim injury, illness, disease, death, or birth defect as a result of exposure to "Agent Orange," or any other herbicide in or near Vietnam at any time from 1961 to 1972, you are now a member of a class in an action brought on your behalf in the United States District Court for the Eastern District of New York, unless you take steps to exclude yourself. The class is limited to those who were injured by exposure to Agent Orange or any other herbicide while serving in the armed forces in or near Vietnam at any time from 1961 to 1972. The class also includes members of families who claim derivative injuries such as those to spouses and children.

The court expresses no opinion as to the merit or lack of merit of the lawsuit. It has ordered that this message be transmitted to give as many persons as is practicable notice of this suit.

For details about your rights in this "Agent Orange" class action lawsuit call 1-800- , or write to the Clerk of the United States District Court, Box —, Smithtown, New York 11787. That address again is Clerk of the United States District Court, P.O. Box —, Smithtown, New York 11787, or call 1-800- .

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**Exhibit C (Newspaper and Magazine Notice)  
TO ALL PERSONS WHO SERVED IN OR NEAR VIET-  
NAM AS MEMBERS OF THE ARMED FORCES OF  
THE UNITED STATES, AUSTRALIA AND NEW ZEA-  
LAND FROM 1961-1972**

If you or anyone in your family can claim injury, illness, disease, death or birth defect as a result of exposure to "Agent Orange" or any other herbicide while assigned in or near Vietnam at any time from 1961 to 1972, you are a member of a class in an action brought on your behalf in the United States District Court for the Eastern District of New York unless you take steps to exclude yourself from the class. The class is limited to those who were injured by exposure to "Agent Orange" or any other herbicide while serving in the armed forces in or near Vietnam at any time during 1961-1972. The class also includes members of families who claim derivative injuries such as those to spouses and children.

The court expresses no opinion as to the merit or lack of merit of the lawsuit.

For details about your rights in this "Agent Orange" class action lawsuit, call 1-800 , or write to Clerk of the Court, Box —, Smithtown, New York 11787.

.....  
Robert C. Heinemann  
Clerk, United States District Court for the  
Eastern District of New York

Dated: Brooklyn, New York  
December , 1983

Opinion of the District Court  
(Pratt, J.) Dated December 29, 1980

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

In re "AGENT ORANGE" PRODUCT LIABILITY LITIGATION

INTRODUCTION

GEORGE C. PRATT, *District Judge*

Plaintiffs, Vietnam war veterans and members of their families claiming to have suffered damage as a result of the veterans' exposure to herbicides in Vietnam<sup>1</sup>, commenced these actions against the defendant chemical companies.<sup>2</sup> Defendants, seeking indemnification or contribution in the event they are held liable to plaintiffs, then served

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<sup>1</sup> Plaintiffs' complaints allege injury as a result of their exposure to a variety of herbicides including Agents Orange, Pink, Purple and Green. For convenience, the court will refer to these herbicides collectively as "Agent Orange".

<sup>2</sup> At the present time 19 companies or divisions have been named as defendants in actions consolidated before this court as MDL 381. Alphabetically listed, the defendants named to date are: Agrisect, Inc.; Amchem Products, Inc.; Ansul Company; AKA Wormald America, Inc.; Diamond Alkali Company; Diamond Shamrock Corporation; Dow Chemical Company; GAF Corporation; Hercules, Inc.; Hoffman-Taff, Inc.; Hooker Chemical Company; Monsanto Company; North American Phillips Corporation; Northwest Industries, Inc.; Occidental Petroleum Company; Private Brands, Inc.; Riverdale Chemical; Syntex Corporation; Uniroyal, Inc. Although an individual action may name some of the chemical companies and not others, the court will refer to these companies collectively as "defendants".

Additionally, some of these named defendants have sought dismissal from some actions on the ground that they did not manufacture any of the herbicides in question. In some cases, plaintiffs have consented to a conditional dismissal of those defendants.



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third party complaints against the United States.<sup>3</sup> Five motions are now considered: (1) the government's motion to dismiss the third party complaint on grounds of sovereign immunity; (2) plaintiffs' motion for class action certification; (3) defendants' motion for summary judgment; (4) plaintiffs' motion to proceed with "serial trials"; and (5) plaintiffs' motion to serve and file a fifth amended verified complaint.

### I. SUMMARY OF CLAIMS

There are four groups of plaintiffs: Vietnam veterans, their spouses, their parents, and their children. They assert numerous theories of liability, including strict products liability, negligence, breach of warranty, intentional tort and nuisance. Plaintiff veterans seeks to recover for personal injuries caused by their exposure to Agent Orange. The family members seek to recover on various derivative claims; some of the children assert claims in their own right for genetic injury and birth defects caused by their parents' exposure to the Agent Orange; and some of the veterans' wives seek to recover in their own right for miscarriages.

In their third party complaints against the government defendants allege negligence, misuse of product, post-discharge failure to warn, implied indemnity, denial of due process and failure to comply with herbicide registration laws.

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<sup>3</sup> As part of an on-going effort to avoid the service and filing of excessive quantities of duplicative papers, the court has deemed the answers and third party complaints of the defendants to be served in all actions.

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## II. GOVERNMENT'S MOTION TO DISMISS THIRD PARTY COMPLAINTS

Moving to dismiss under F.R.C.P. 12(b)(6), the government claims "intra-military immunity" under the rule of *Feres v. United States*, 340 U.S. 135, 71 S. Ct. 153, 95 L. Ed. 152 (1950), questions defendants' standing to assert some of their claims, urges that other claims may only be considered in the Court of Claims, and argues the applicability of three statutory exceptions to federal court jurisdiction under the Federal Tort Claims Act; (1) the discretionary function exception, 28 U.S.C. § 2680(a); (2) the combatant exception, 28 U.S.C. § 2680(j); and (3) the foreign country exception, 28 U.S.C. § 2680(k).

### A. FTCA AS A GENERAL WAIVER OF SOVEREIGN IMMUNITY

Under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b) *et seq.*, the United States government waives its sovereign immunity from suits in tort, and vests jurisdiction over such claims exclusively in the United States District Courts. 28 U.S.C. § 1346(b). Its legislative history reveals two dominant congressional objectives. First, Congress sought to relieve itself of the overwhelming pressures and time consuming burdens of considering and passing upon the numerous private relief bills sought by claimants barred by the doctrine of sovereign immunity. *Feres v. United States*, 340 U.S. 135, 139-140, 71 S. Ct. 153, 156, 95 L. Ed. 152 (1950). Second, Congress sought to provide a judicial remedy for deserving claimants who had suffered injuries or losses at the hands of government officials and employees. 1 *Jayson, Handling Federal Tort Claims* § 65.01 at 3-3 (1980).

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Although the FTCA "waives the Government's immunity from suit in sweeping language", *United States v. Yellow Cab Company*, 340 U.S. 543, 547, 71 S. Ct. 399, 402, 95 L. Ed. 523 (1951), the waiver is limited by the terms of the act's exceptions. If a claim falls within any exception to the FTCA, sovereign immunity has not been waived and the court is without jurisdiction to hear the case. *United States v. Orleans*, 425 U.S. 807, 814, 96 S. Ct. 1971, 1975, 48 L. Ed.2d 390 (1976); *Dalehite v. United States*, 346 U.S. 15, 30-31, 73 S. Ct. 956, 965, 97 L. Ed. 1427 (1953).

**B. THE *Feres* DOCTRINE**

In *Feres v. United States*, 340 U.S. 135, 71 S. Ct. 153, 95 L. Ed. 152 (1950), the Supreme Court determined that the FTCA did not waive sovereign immunity with respect to claims of servicemen arising out of activities incident to or arising out of their military service. The *Feres* Court considered three separate cases, two claims of medical malpractice and the claimed negligent quartering of a serviceman in a barracks containing a defective heating unit. All three presented the same basic question: whether a serviceman who sustained injury due to the negligence of others in the armed forces could maintain suit under the FTCA. The Court recognized its task as one of statutory interpretation, stating: "The only issue of law raised is whether the Tort Claims Act extends its remedy to one sustaining 'incident to the service, what under other circumstances would be an actionable wrong.'" 340 U.S. at 138, 71 S. Ct. at 155. After carefully considering the limited legislative history on point, the *Feres* Court concluded that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." 340 U.S. at 146, 71

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S. Ct. at 159. Since much of the government's immunity defense turns on the Supreme Court's decision in *Feres*, a more detailed analysis of that case is appropriate.

At the outset, the *Feres* Court recognized the difficulty of interpreting a statute having so little legislative history:

There are few guiding materials for our task of statutory construction. No committee reports or floor debates disclose what effect the statute was designed to have on the problem before us, or that it even was in mind. Under these circumstances, no conclusion can be above challenge, but if we misinterpret the Act, at least Congress possesses a ready remedy. 340 U.S. at 138, 71 S. Ct. at 155.

Digging deeper, the Court uncovered two clues to Congress' intent in enacting the FTCA. First, because the relationship between the government and members of the armed forces is "distinctively federal in character", 340 U.S. at 143, 71 S. Ct. at 158, the Court determined that Congress did not intend the government's liability to members of the armed services to depend upon the law of the place where the soldier happened to be stationed at the time of injury:

It would hardly be a rational plan of providing for those disabled in service by others in service to leave them dependent upon geographic considerations over which they have no control and to laws which fluctuate in existence and value. 340 U.S. at 143, 71 S. Ct. at 158.

Second, the Court examined Congress' failure to integrate a serviceman's possible remedy in tort with the statutory "no fault" compensation scheme provided under the Veterans Benefits Act and concluded that

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If Congress had contemplated that this Tort Act would be held to apply in cases of this kind [where a serviceman sued the government], it is difficult to see why it should have omitted any provision to adjust these two types of remedy [FTCA and Veterans Benefit Act] to each other. The absence of any such adjustment is persuasive that there was no awareness that the Act might be interpreted to permit recovery for injuries incident to military service.

340 U.S. at 144, 71 S. Ct. at 158.

A third factor supporting the "*Feres* doctrine" was later enunciated in *United States v. Brown*, 348 U.S. 110, 75 S. Ct. 141, 99 L. Ed. 139 (1954), where the Supreme Court considered "[t]he peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on [military] discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty." 348 U.S. at 112, 75 S. Ct. at 143; *see also Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 671-72, 97 S. Ct. 2054, 2057, 52 L. Ed.2d 665 (1977).

Although it concluded that Congress did not intend to include in the FTCA's waiver of sovereign immunity injuries sustained by a serviceman incident to his service, the *Feres* Court freely admitted that the issue was not free from doubt, and it invited congressional correction by calling attention to Congress' ability to legislatively remedy any erroneous interpretation of the statute. 340 U.S. at 138, 71 S. Ct. at 155. Many courts have questioned the

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wisdom of the *Feres* decision,<sup>4</sup> but its continued vitality is beyond dispute even to them.<sup>5</sup> Moreover, Congress's failure for 30 years to amend the FTCA and legislatively "correct" the *Feres* holding is a *sub silentio* "acquiesc[ence] in the holding of *Feres*", *United States v. Lee*, 400 F.2d 558, 561 (CA9 1968), *cert. denied*, 393 U.S. 1053, 89 S. Ct. 691, 21 L. Ed. 2d 695 (1969), that strongly suggests that the Supreme Court correctly interpreted congressional intent.<sup>6</sup>

Any doubt as to the validity of the *Feres* doctrine was laid to rest in *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 97 S. Ct. 2054, 52 L. Ed. 2d 665 (1977), which extended the reach of the "well established doctrine of *Feres v. United States*" to third party claims against the government, 431 U.S. at 670, 97 S. Ct. at 2057, see discussion, *infra*.<sup>7</sup> Even the Third Circuit Court of

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<sup>4</sup> See, e.g., *Peluso v. United States*, 474 F.2d 605, 606 (CA3), *cert. denied*, 414 U.S. 879, 94 S. Ct. 50, 38 L. Ed. 2d 124 (1973) ("If the matter were open to us we would be receptive to appellants' argument that *Feres* should be reconsidered, and perhaps restricted"); *Thomason v. Sanchez*, 398 F. Supp. 500, 503 (D.N.J. 1975) ("we previously expressed reservations about the continued validity of the broad *Feres* doctrine. Upon reconsideration we reiterate that concern.")

<sup>5</sup> See *Peluso v. United States*, *supra*, at 606 ("[*Feres*] is controlling. Only the Supreme Court can reverse it."); *Thomason v. Sanchez*, 539 F.2d 955, 957 (CA3 1976) ("[W]e are powerless to jettison *Feres* or to dislodge it sufficiently to create an exception [here].") See also *Watkins v. United States*, 462 F. Supp. 980 (S.D. Ga. 1977), *aff'd on opinion below*, 587 F.2d 279 (CA5 1979).

<sup>6</sup> This conclusion follows even though later decisions have repudiated some of the clues to intent that the Supreme Court relied upon in reaching that decision. See *Schwager v. United States*, 279 F. Supp. 262, 263 (E.D. Pa. 1968).

<sup>7</sup> See also *Jaffee v. United States*, 592 F.2d 712, 717 (CA3 1979), *cert. denied*, 441 U.S. 961, 99 S. Ct. 2406, 60 L. Ed. 2d 1066 (1979); *Dilworth v. United States*, 387 F.2d 590, 591 (CA3 1967); *Buckingham v. United States*, 394 F.2d 483, 484 (CA4 1968).

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Appeals, the court most critical of the *Feres* doctrine,<sup>8</sup> concedes *Feres*' continuing validity and broad application:

Although the current climate of academic and judicial thought finds governmental immunity from suit in disfavor, a plausible explanation appears for its continued application to members of the armed forces injured while in the course of active duty, regardless of whether that injury is caused by the negligence of a superior officer or by a direct command. If claims for injuries sustained by members of the armed forces in the execution of military orders were subjected to the scrutiny of courts of justice, then the civil courts would be required to examine and pass upon the propriety of military decisions. The security and common defense of the country would quickly disintegrate under such meddling. "[A]ctions and essential military discipline would be impaired by subjecting the command to the public criticism and rebuke of any member of the armed forces who chose to bring a suit against the United States". *Jefferson v. United States*, 178 F.2d 518, 520 (4th Cir. 1949), *aff'd sub nom. Feres v. United States*, 340 U.S. 135 [71 S. Ct. 153, 95 L. Ed. 152] (1950) Even if we were inclined to reconsider the doctrine in connection with an injury sustained as a result of a deliberate military command, we are foreclosed from so doing by the Supreme Court's recent reiteration of the doctrine, although in a different context in *United States v. Testan*, 424 U.S. 392, 96 S. Ct. 948, 47 L. Ed. 2d 114 (1976).

*Jaffe v. United States*, 592 F.2d 712, 717 (CA3 1979) (citations and footnote omitted).

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<sup>8</sup> See e.g., *Thomason v. Sanchez*, 539 F.2d 955 (CA3 1976); *Peluso v. United States*, 474 F.2d 605 (CA3), *cert. denied*, 414 U.S. 879, 94 S. Ct. 50, 38 L. Ed. 2d 124 (1973).

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## C. THIRD PARTY ACTIONS AGAINST THE GOVERNMENT

The same court that determined in *Feres* that the FTCA did not waive sovereign immunity with respect to claims by servicemen arising out of activities incident to their military service also decided *United States v. Yellow Cab Company*, 340 U.S. 543, 71 S. Ct. 399, 95 L. Ed. 523 (1951), which held that the FTCA permits a tort defendant to implead the United States as a third party defendant under a theory of indemnity or contribution. This created a new question: whether such a third party claim may be maintained when plaintiff's direct claim against the government would be barred by the principles of *Feres*.

The Supreme Court did not consider this question until 1977, when in *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 97 S. Ct. 2054, 52 L. Ed. 2d 665 (1977), it resolved the "tension between *Feres* and *Yellow Cab*" by holding that third party claims against the government are barred

for essentially the same reasons that the direct action [against the government by plaintiff] is barred by *Feres*. \* \* \* [T]he right of a third party to recover in an indemnity action against the United States recognized in *Yellow Cab*, must be held limited by the rationale of *Feres* where the injured party is a serviceman. 431 U.S. at 670, 673-4, 97 S. Ct. at 2058.

To permit recovery against the government, the Court observed, "would be to judicially admit at the back door that which has been legislatively turned away at the front door". 431 U.S. at 673, 97 S. Ct. at 2058 *quoting Laird v. Nelms*, 406 U.S. 797, 802, 92 S. Ct. 1899, 1902, 32 L. Ed. 2d 499 (1972).



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D. FERES/STENCEL IN THE CONTEXT OF THIS ACTION

To the extent that plaintiffs' complaints seek recovery against the defendant chemical companies, of course, the *Feres* doctrine has no application. 1 Jayson, *Handling Federal Tort Claims* § 155.02 at 5-66 n. 9 and 5-77 n.24. Under *Stencel Aero Engineering Corp. v. United States*, however, any damages recovered by plaintiffs against defendants that plaintiffs could not recover directly from the United States may not be the subject of a third party complaint against the United States. 1 Jayson, *Handling Federal Tort Claims* § 164 at 5-220.

[N]either contribution nor indemnity may succeed without the support of the initial negligence. \* \* \*

[A]s the claimed contribution and indemnity must depend for success upon the alleged negligence of the government towards plaintiffs, and that is a negligence which is not actionable, the claim must fail. *Drumgoole v. Virginia Electric and Power Company*, 170 F. Supp. 824, 825-26 (E.D. Va. 1952).

*See also Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 97 S. Ct. 2054, 52 L. Ed. 2d 665 (1977); *Certain Underwriters at Lloyds v. United States*, 511 F.2d 159 (CA5 1975); *Barr v. Brezina Construction Company*, 464 F.2d 1141 (CA 10 1972). For the sake of clear presentation in this opinion, however, the court will consider plaintiffs' claims as if they were asserted directly against the United States government, for, to the extent that plaintiffs may not maintain actions directly against the government, under the principles of *Stencel Aero*, the de-

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endants' third party claims against the government must fall as well.<sup>9</sup>

At the outset, it is clear that *Feres* applies to suits against individual servicemen,<sup>10</sup> claims by servicemen who served in Vietnam,<sup>11</sup> claims of intentional torts,<sup>12</sup> and claims styled as constitutional torts.<sup>13</sup> This leaves two issues: first, whether the court should apply the principles of *Feres/Stencel* to this action at all; and second, whether plaintiffs' injuries arose out of or were suffered "in the course of activity incident to service." *Feres v. United States*, 340 U.S. at 146, 71 S. Ct. at 159.

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<sup>9</sup> For convenience the court will refer to the principle that the government is immune from third party claims that would be barred by *Feres* if directly asserted against the government as "*Feres/Stencel*".

<sup>10</sup> *Tirrell v. MacNamara*, 451 F.2d 579 (CA9 1971); *Bailey v. DeQuevedo*, 375 F.2d 72 (CA3 1967), *cert. denied*, 389 U.S. 923, 88 S. Ct. 247, 19 L. Ed. 2d 274 (1967); *Misko v. United States*, 453 F. Supp. 513, 514 (D.D.C. 1977), *aff'd* 593 F.2d 1371 (C.A. D.C. 1979); *Pisciotta v. Ferrando*, 428 F. Supp. 685, 686 (S.D.N.Y. 1977).

<sup>11</sup> *Rotko v. Abrams*, 338 F. Supp. 46, 47 (D. Conn. 1971), *aff'd*, 455 F.2d 992 (CA2 1972); 1 Jayson, *Handling Federal Tort Claims* § 155.08[4][i] at 5—138.

<sup>12</sup> *Citizens National Bank of Waukegan v. United States*, 594 F.2d 1154 (CA7 1979); *Jaffe v. United States*, 592 F.2d 712 (CA3 1979), *cert. denied*, 441 U.S. 961, 99 S. Ct. 2406, 60 L. Ed. 2d 1066 (1979); *Everett v. United States*, 492 F. Supp. 318, 321 (S.D. Ohio 1980); *Schmid v. Rumsfeld*, 418 F. Supp. 19, 21 (N.D. Cal. 1979).

<sup>13</sup> *Everett v. United States*, 492 F. Supp. 318, 322 (S.D. Ohio 1980); *Nagy v. United States*, 471 F. Supp. 383, 384 (D.D.C. 1979); *Misko v. United States*, 453 F. Supp. 513, 515 (D.D.C. 1978), *aff'd*, 593 F.2d 1371 (C.A.D.C. 1978); *Calhoun v. United States*, 475 F. Supp. 1, 4-5 (S.D. Cal. 1977), *aff'd on opinion below*, 604 F.2d 647 (CA9 1979), *cert. denied*, 444 U.S. 1078, 100 S. Ct. 1029, 62 L. Ed. 2d 761 (1980).

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## E. SHOULD FERES/STENCEL APPLY TO THIS ACTION?

The government seeks to dismiss the third party complaints on the ground that the claims of the defendant chemical companies are barred by a straightforward application of *Feres/Stencel* principles. Defendants, however, argue that the court should undertake "a detailed and fresh examination of the rationale underlying those holdings [*Feres* and *Stencel*] in the light of other great and \* \* \* superceding policy considerations", Hercules/Diamond Shamrock/Monsanto Memorandum at 10, to determine if the *Feres* doctrine should be applied in this case.<sup>14</sup> In support, defendants cite the "number of occasions [the Supreme Court has] reexamined and redefined or abandoned certain reasons for its holding in [the *Feres*] case." Hercules/Diamond Shamrock/Monsanto Memorandum at 7.<sup>15</sup>

Defendants' attempts to reargue the underlying rationale of *Feres* must be rejected, however, for two reasons. First, *Feres* was a case of statutory interpretation. 340 U.S. at 138, 71 S. Ct. at 155. *Adams v. General Dynamics Corp.*, 385 F. Supp. 890, 891 (N.D. Cal. 1974), *aff'd*, 535 F.2d 489 (CA9), *cert. denied*, 432 U.S. 905, 97 S. Ct. 2949, 53 L. Ed. 2d 1077 (1976). Even were this court to believe the Supreme Court's reasoning to be erroneous,<sup>16</sup> neither

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<sup>14</sup> See also Dow's Memorandum at 28; Thompson-Hayward's Memorandum at 12; Hooker's Memorandum at 6.

<sup>15</sup> See also Dow's Memorandum at 16.

<sup>16</sup> Although some of the principles relied upon by the *Feres* Court have since been discredited or repudiated, see 1 Jayson, *Handling Federal Tort Claims*, § 155.05 at 5-86 through 5-91, much of the Court's reasoning remains valid and persuasive. *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 672-73, 97 S. Ct. 2054, 2058, 52 L. Ed. 2d 665 (1977); *Jaffe v. United States*, 592 F.2d 712, 717 (CA3 1979), *cert. denied*, 441 U.S. 961, 99 S. Ct. 2406, 60 L. Ed. 2d 1066 (1979); *Coffey v. United States*, 324 F. Supp. 1088, 1087, 1088 (S.D. Cal. 1971), *aff'd*, 455 F.2d 1380 (CA9 1972).

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the Court nor Congress itself has altered *Feres'* basic holding, that in enacting the FTCA Congress did not intend to waive sovereign immunity with respect to injuries or loss suffered by servicemen in the course of activity incident to their service.<sup>17</sup>

Second, in holding the government immune from claims by servicemen the Supreme Court was concerned with more than the effects of servicemen recovering against the government; the Court was also concerned about the disruptive effects caused by the very commencement of actions by servicemen complaining about the conduct of superiors. As the Court later observed in *United States v. Brown*, 348 U.S. 110, 75 S. Ct. 141, 99 L. Ed. 139 (1954):

The peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if such suits under the Torts Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty,

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<sup>17</sup> That Congress, despite ample opportunity, has failed to right any possible judicial misinterpretation indicates that the soundness of the *Feres* conclusion regardless of whether specific elements of the Court's reasoning remain valid. See *United States v. Lee et al.*, 400 F.2d 558 (CA9 1968), *cert. denied*, 393 U.S. 1053, 89 S. Ct. 691, 21 L. Ed. 2d 695 (1969), wherein the court found that

Congress has acquiesced in the holding of *Feres* [by] permitting the decision to remain undisturbed for eighteen years. \* \* \* "[W]hen the questions are of statutory construction, not of constitutional import, Congress can rectify our mistake, if such it was, or change its policy at any time, and in these circumstances reversal is not readily to be made.

400 F.2d at 561, quoting *United States v. South Buffalo Railway Company et al.*, 333 U.S. 771, 774-75, 68 S. Ct. 868, 870, 92 L. Ed. 1077 (1948).

The reasoning of *Lee* is now twelve years stronger.

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led the [Feres] Court to read [the Federal Tort Claims] Act as excluding claims of [servicemen for injuries incident to their service]. 348 U.S. at 112, 75 S. Ct. at 143.

Thus, it is the suit itself as much as the possibility of recovery, that the Supreme Court feared would disrupt military discipline and the orderly conduct of military affairs. *Henninger v. United States*, 473 F.2d 814, 815-16 (CA9), cert. denied, 414 U.S. 819, 94 S. Ct. 43, 38 L. Ed.2d 51 (1973). To reexamine the *Feres* rationale in light of the circumstances of this case as defendants suggest, would itself defeat one of the very factors defendants seek to have the court reconsider. As the Supreme Court noted long ago in discussing the relationship between a soldier and his superiors:

An army is not a deliberate body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to commend in the officer, or the duty of obedience in the soldier. Vigor and efficiency on the part of the officer and confidence among the soldiers in one another, are impaired if any question be left open as to their attitude to each other. *United States v. Grimley*, 137 U.S. 147, 153, 11 S. Ct. 54, 55, 34 L. Ed. 636 (1890).

For these reasons, this court will neither reconsider the underlying rationale of the *Feres* decision nor weigh the circumstances here presented against the "*Feres* factors".<sup>10</sup>

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<sup>10</sup> Other courts have rejected similar attempts to reargue the "*Feres* factors" on a case-by-case basis. See e.g., *Torres v. United*

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Right or wrong, the Supreme Court's conclusion that Congress did not intend passage of the FTCA to act as a waiver of sovereign immunity as to claims of servicemen injured incident to their service remains the law of the land. The *Feres/Stencel* doctrine bars defendants' attempt to seek contribution or indemnity from the United States based on any recovery plaintiffs may obtain for injuries that arose out of or were suffered incident to service.

#### F. DID PLAINTIFFS' INJURIES ARISE OUT OF OR INCIDENT TO MILITARY SERVICE?

The second issue is whether the claims of particular plaintiffs arose out of or in the course of activity incident to service. As Professor Jayson has noted, "neither the [Federal Tort Claims] Act nor the opinions of the Supreme Court have indicated definitively the full meaning of the phrase 'incident to service' ". 1 Jayson, *Handling Federal Tort Claims* § 155.01 at 5-65.<sup>19</sup> This lack of definition

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*States*, 621 F.2d 30, 32 (CA7 1980) (*Feres* applies even without nexus between military discipline and injury); *Joseph v. United States*, 505 F.2d 525, 527 (CA7 1974) (denial of veterans benefits "completely independent" from consideration of applicability of *Feres* doctrine); *Henninger v. United States*, 473 F.2d 814, 815-16 (CA9), cert. denied, 414 U.S. 819, 94 S. Ct. 43, 38 L. Ed. 2d 51 (1973) (although negligence at discharge does not affect military discipline, *Feres* still applies); *Healy v. United States*, 192 F. Supp. 325, 328 (S.D.N.Y. 1961), aff'd on opinion below, 295 F.2d 958 (CA2 1961) (availability of veterans benefits not controlling); *Morgan v. United States*, 366 F. Supp. 938, 939 (N.D. Fla. 1973) (*Feres* bars claims even though plaintiff not subject to military discipline at time of injury); see also, 1 Jayson, *Handling Federal Tort Claims* § 155.02 at 5-74.

<sup>19</sup> "The *Brooks-Feres-Brown* line of cases illustrates that the incident to service test is not easy to define and apply." *Woodside v. United States*, 606 F.2d 134, 141 (CA6 1979).

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complicates the task of applying the standard considerably, 1 Jayson *Handling Federal Tort Claims* § 155.01 at 5-65, but certain principles do emerge from an examination of the cases.

### 1. *General Principles*

First, the phrase "incident to service" is not to be narrowly applied or "restricted to actual military operations such as field maneuvers or small arms instruction." *Hass v. United States*, 518 F.2d 1138, 1141 (CA4 1975). Rather, "incident to service" is a broad concept that depends on a rational connection between the plaintiff's claim or loss and his status as a member of the armed forces. *Woodside v. United States*, 606 F.2d 134, 141 (CA6 1979); *Harten v. Coons*, 502 F.2d 1363, 1365 (CA 10 1974), *cert. denied*, 420 U.S. 963, 95 S. Ct. 1354, 43 L. Ed.2d 441 (1975). Professor Jayson summarizes this concept:

[I]f the serviceman's injury or loss, when viewed in all the surrounding circumstances, has a real and substantial relationship to his military service, it will be regarded as incident to service and consequently barred under the *Feres* doctrine. 1 Jayson, *Handling Federal Tort Claims* § 155.02 at 5-66.<sup>20</sup>

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<sup>20</sup> See also *Healy v. United States*, 192 F. Supp. 325, 327 n.8 (S.D.N.Y. 1961), *aff'd*, 295 F.2d 958 (CA2 1961) ("special soldier-Government relationship which embraces the incident-to-service concept covers those wrongs which, although not sustained in the course of active duty, are so closely related to it that they may be deemed 'incident' to that duty"); 1 Jayson, *Handling Federal Tort Claims* § 155.02 at 5-79 through 5-80 ("in order for a claim to be service-incident, there does not have to be any proximate causation in the common-law tort sense, between the military service or employment in the damage. All that is required is that as an incident of his service or employment the claimant is placed in a position where he is surrounded with conditions giving rise to the claim").



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Second, the cases applying the *Feres* doctrine emphasize that "it is the *status* of the claimant as a serviceman rather than the legal theory of his claim which governs." *Rotko v. Abrams*, 338 F. Supp. 46, 47 (D. Conn. 1971) (emphasis added), *aff'd on opinion below*, 455 F.2d 992 (CA2 1972).<sup>21</sup> Thus, the *Feres* doctrine has barred the claims of off duty servicemen injured before leaving their military base, *Watkins v. United States*, 462 F. Supp. 980, 988-89 (S.D. Ga. 1977), *aff'd on opinion below*, 587 F.2d 279 (CA5 1979), of off duty serviceman injured while "hitching" a ride home on military aircraft, *Archer v. United States*, 217 F.2d 548, 552 (CA9 1954), *cert. denied*, 348 U.S. 953, 75 S.Ct. 441, 99 L. Ed. 745 (1955); *Homlitas v. United States*, 202 F. Supp. 520 (D. Ore 1962); *Fass v. United States*, 191 F. Supp. 367 (E.D.N.Y. 1961), and the wrongful death claim of the widow of a serviceman killed in an air crash while receiving flight instruction toward a commercial pilot's license. *Woodside v. United States*, 606 F.2d 134 (CA6 1979).

Third, at the time of his injury plaintiff need not be on any military mission. *Feres v. United States*, 340 U.S. 135, 71 S. Ct. 153, 95 L. Ed. 152 (1950) (serviceman died when barracks he was sleeping in burned due to defective heating unit),<sup>22</sup> nor subject to military discipline, *Hall v. United States*, 451 F.2d 353, 354 (CA1 1971) (no "con-

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<sup>21</sup> See also *U. S. v. Lee*, 400 F.2d 558, 562 (CA9 1968), *cert. denied*, 393 U.S. 1053, 89 S. Ct. 691, 21 L. Ed. 2d 695 (1969); *Knoch v. United States*, 316 F.2d 532, 534 (CA9 1963); *Frazier v. United States*, 372 F. Supp. 208, 210 (M.D. Fla. 1973).

<sup>22</sup> See also *Hass v. United States*, 518 F.2d 1138, 1141 (CA4 1975) (*Feres* bars claim of off-duty serviceman injured while riding a dangerous horse rented from a Marine Corps stable).



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nection between the activity which injured plaintiff and [military] discipline" necessary).<sup>23</sup>

Professor Jayson concisely and fairly synthesizes the "incident to service" cases as follows:

The duty status of the serviceman-claimant is of particular significant in determining whether the injury or loss was incident to service. The [Supreme Court's rationale in *Feres/Stencel*] applies to almost every situation which can be envisaged in which the injury or loss was sustained by a serviceman while on duty (as distinguished from one who is on leave or furlough), and it seems safe to say that the *Feres* doctrine will always apply in such circumstances. 1 Jayson, *Handling Federal Tort Claims* § 155.02 at 5-69 through 5-71.

[I]f the serviceman's injury or loss occurs while he is off duty, while he is not within the physical confines of his military base, while he is not engaged in any military mission, and is not directly under military discipline, it is likely that the *Brooks* doctrine allowing Tort Claims Act recovery will apply;<sup>24</sup>

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<sup>23</sup> See also *Hass v. United States*, 518 F.2d 1138, 1140 (CA4 1975); *James v. United States*, 358 F. Supp. 1381, 1385 (D.R.I. 1973), *aff'd*, 530 F.2d 962 (CA1), *cert. denied*, 429 U.S. 998, 97 S. Ct. 523, 50 L. Ed. 2d 608 (1976).

<sup>24</sup> In *Brooks v. United States*, 337 U.S. 49, 69 S. Ct. 918, 93 L. Ed. 1200 (1949), the Supreme Court held that a serviceman may recover under the FTCA on claims which have no relationship to his military service. Anticipating the issues ultimately considered in *Feres* one term later, the Court stated:

we are dealing with an accident which had nothing to do with the Brooks' army careers, injuries not caused by their service except in the sense that all human events depend upon what

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in other words, that the injury or loss will be regarded as not incident to service. It should be noted, however, that the application of *Brooks* generally requires all of the mentioned factual elements to be present. Contrariwise, if the injury or loss occurs while the serviceman is on duty, or—without regard to whether he is on or off duty—if it occurs on the military base where he is stationed or on a military aircraft whether he is directly under military control and discipline, or if it occurs while he is engaged in a military mission, it is likely that the *Feres* doctrine excluding the claim will apply. Again speaking generally, the presence of any one of the mentioned factual elements will bring application of the *Feres* doctrine. Jayson, *Handling Federal Tort Claims* § 155.02 at 5-67 through 5-68.

## 2. *Application of Feres/Stencel to Plaintiffs' Claims*

### (a) Plaintiff Veterans' Claims of Exposure

The veterans' claims of injury clearly arise from their alleged exposure to Agent Orange during their military service. While virtually all of the veterans allege that their exposure took place in southeast Asia as a direct result of government efforts to defoliate the forests during the Vietnam war, the circumstances of each veteran's claimed exposure may vary. Some claim to have been directly sprayed with Agent Orange; some claim to have come into contact with Agent Orange as a result of being transported through

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has transpired. Were the accident incident to the Brooks' service a wholly different case would be presented. We express no opinion as to it \* \* \*. 337 U.S. at 52, 69 S. Ct. at 920.

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sprayed areas; others claim to have been exposed to Agent Orange by ingesting water or food contaminated with the herbicide; and still others claim exposure during the transportation and handling of Agent Orange or its containers.

Whatever the facts surrounding a particular veteran's claim of exposure may be,<sup>25</sup> each veteran's presence in southeast Asia resulted solely from their military service, and, as to each veteran, "as an incident to his service or employment [he was] placed in a position where he [was] surrounded with conditions giving rise to the claim" of exposure. See 1 Jayson *Handling Federal Tort Claims* § 155.02 at 5-78 through 5-79. Even veterans who claim injury as the result of exposure to Agent Orange while off duty are within the parameters of the *Feres* doctrine because "when viewed in all the surrounding circumstances", a veteran's exposure in southeast Asia to a herbicide used for military purposes "has a real and substantial relationship to his military service \* \* \* and consequently [his claim] is barred under the *Feres* doctrine." 1 Jayson, *Handling Federal Torts Claims* § 155.02 at 5-66.<sup>26</sup>

The analysis is similar for those veterans who claim that their exposure to Agent Orange occurred within the

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<sup>25</sup> Defendants' attempts in connection with this motion to require individual factual hearings on the circumstances of each veteran's exposure to Agent Orange must be rejected. Such rejection, however, does not preclude later examination of individual plaintiffs concerning the circumstances of their exposure to the extent that they may bear on other issues, e.g., individual liability or damage questions.

<sup>26</sup> See also *Woodside v. United States*, 606 F.2d 134, 141 (CA6 1979) ("Where the two [the injury causing activity and the Armed Forces] are closely associated or naturally related, the activity will be deemed "incident to service" even though not an essential or integral part of the mission of the Armed Forces and even though not directly involving a command relationship between the soldier and the military").

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United States or places other than southeast Asia during their military service. Their handling, transportation or distribution of Agent Orange during the course of their military duties was incident to their service, and their claims are equally barred under the *Feres* doctrine.

(b) Post-Discharge Failure to Warn

Only one of plaintiff veterans' claims does not fall easily under this analysis, i.e., that defendants breached a post-discharge duty to the veterans by failing to notify them of new scientific information concerning the possible harm that could result from exposure to Agent Orange. Plaintiff veterans allege that defendants' failure to inform them of possible dangers associated with exposure to Agent Orange prevented them from seeking more frequent medical examinations and thereby insuring early detection and treatment of disease. Defendants seek indemnity and contribution from the government on this claim too.

Defendants rely on three cases in opposition to the government's motion to dismiss these "post-discharge" claims: *Schwartz v. United States* 230 F. Supp. 536 (E.D. Pa. 1964); *Thornwell v. United States*, 471 F. Supp. 344 (D.D.C. 1979); *Everett v. United States*, 492 F. Supp. 318 (S.D. Ohio 1980).

In *Schwartz v. United States* a serviceman treated for a sinus condition during the course of his military service had a radioactive dye, umbarthor, inserted into his sinus. After discharge from the military, plaintiff sought additional medical treatment for his sinus difficulties, but the Veterans Administration hospital that considered his treatment failed to obtain and examine his medical records, and, as a result of the hospital's negligence, the continued presence of the earlier-inserted umbrathor went undetected. As a result

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plaintiff contracted cancer. The court held that *Feres* did not bar plaintiff's claim against the government, because plaintiff's claim of negligence lay not in the original insertion of the umbrathor at the time he was in the military; rather, the court found that the actionable negligence was the hospital's failure to take reasonable steps to diagnose and solve plaintiff's problem, the continued presence of the umbrathor in his sinus. 230 F. Supp. at 539-40. The court further opined that the government was negligent for its failure to followup its umbrathor patients in order to inform them of newly discovered dangers associated with the drug. 230 F. Supp. at 540.

In the second case relied on by the defendants, *Thornwell v. United States*, a former serviceman alleged that he was intentionally drugged with LSD as part of a secret government experiment and that the government negligently failed to warn plaintiff that his exposure to the drug subjected him to certain medical risks. The *Thornwell* court, noting the difficulties that courts encounter when the acts complained of commence while plaintiff is on active duty and then continue until well after discharge, 471 F. Supp. at 350, held that *Thornwell's* claim against the government was not barred by the principles of *Feres* because he did not allege merely continuing negligence. Rather,

[h]e claim[ed] that he was *intentionally* harmed while he was on active duty and he further claim[ed] that, after he became a citizen [left the military], the defendants failed to exercise their duty of care by neglecting to rescue him from the position of danger which they had created, \* \* \* two distinctly separate patterns of conduct, one intentional and [one] negligent. 471 F. Supp. at 351.

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The *Thornwell* court then found that plaintiff had alleged "two entirely different torts", and since the "complaint [was] perfectly clear in its allegation that the negligent act occurred, *in its entirety*, after [plaintiff] attained civilian status", 471 F. Supp. at 351 (emphasis in original), plaintiff's claim of governmental negligence was not barred by *Feres*. *Id.* The *Thornwell* court divided the cases involving servicemen's claims of post-discharge negligence into three types:

To summarize the relevant precedent, it appears that there are three types of personal injury cases which involve post-discharge negligence. In the first case, the military performed separate negligent acts (i.e., two improper operations), one before, and one after discharge; *United States v. Brown*, 348 U.S. 110 [75 S. Ct. 141, 99 L.Ed. 139], and *Hungerford v. United States*, 192 F.Supp. 581 (N.D. Cal.1961), *rev'd on other grounds*, 307 F.2d 99 (9th Cir. 1962), both clearly indicate that the injured veteran may recover for the later act. In the second case, a single negligent act occurs and its effects linger after discharge; *Feres v. United States*, 340 U.S. 135 [71 S. Ct. 153, 95 L. Ed. 152] (1950), holds that, under some circumstances, this one act is subject to intra-military immunity. Third, the military may commit an intentional act and then negligently fail to protect a soldier turned civilian from the dire consequences which will flow from the original wrong. This Court holds that, under such circumstances, the injured civilian may have a valid claim against the tort feors. The later negligence is a separate wrong, a new act or omission occurring after civilian status is attained; the perpetrators of

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this wrong must be held accountable for their conduct. 471 F. Supp. at 352.

In defendants' third case, *Everett v. United States*, 492 F. Supp. 318 (S.D. Ohio 1980), the wife of a deceased serviceman sued the government claiming that her husband's death by cancer was the result of his being intentionally exposed to large doses of radiation when he was forced to participate as an Air Force enlisted man in military maneuvers in a nuclear blast area less than one hour after detonation of the nuclear device. Plaintiff argued that her husband's march through the hazardous area was part of an experimental project to test the effects of nuclear radiation. Refusing to dismiss plaintiff's claim of post-discharge negligence, the *Everett* court found that the fact picture "properly falls in the third category" of the *Thornwell* analysis—intentional act incident to service, plus a separate wrong of post-discharge negligence. 492 F. Supp. at 325.

These cases are distinguishable from the facts at bar in several important respects. First, unlike the *Schwartz* case, the post-discharge negligence asserted here is not separate and distinct from the numerous acts of negligence alleged to have occurred incident to plaintiff's service. *Schwartz*, who sought medical treatment after his discharge, had a predischarge condition that was improperly diagnosed and negligently treated after discharge. That the condition arose due to government installation of the umbrathor in plaintiff's sinus while he was a serviceman does not alter the fact that the governmental negligence occurred, in its entirety, long after plaintiff became a civilian. Unsupported dicta aside, *Schwartz* stands only for the proposition that recovery for negligent performance of post-discharge medical treatment is not barred merely because the original condition

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arose from medical treatment that is not actionable under *Feres*.

Thus, *Schwartz* properly falls under *Thornwell's* "first case", where "the military performed separate negligent acts (i.e., two improper operations), one before, and one after, discharge". 471 F. Supp. at 352. Here, plaintiff's claim of post-discharge failure to warn does not present a separate and distinct act of post-discharge negligence on the part of the government. Of course, any veteran in this case who faces a situation analogous to *Schwartz*, that is, who seeks post-discharge medical assistance from the government for an Agent Orange related malady and is negligently treated at a government hospital, may prosecute his claim for negligent treatment without the *Feres* impediment.

Second, unlike the *Thornwell* and *Everett* cases, plaintiffs here do not allege that the government caused them intentional harm by subjecting them to a form of human experimentation. *Thornwell*, joined by *Everett*, emphasized the distinction between cases of predischarge torts that were intentional and those that were negligent:

Mr. Thornwell \* \* \* does not allege a mere continuing negligent omission [which would be barred by *Feres*]. He claims he was *intentionally* harmed while he was on active duty and he further claims that, after he became a civilian, the defendants failed to exercise their duty of care by neglecting to rescue him from the position of danger which they had created. \* \* \* Mr. Thornwell's claims for in-service, and out-of-service, injuries, certainly involve two distinctly separate patterns of conduct, one intentional and [one] negligent. 471 F. Supp. at 351 (emphasis in original)



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Thus, both the *Thornwell* and *Everett* courts were presented with the "third case" in the *Thornwell* analysis, where the military "commit[s] an intentional act and then negligently fail[s] to protect a soldier turned civilian from the dire consequences which will flow from the original [intentional] wrong." 471 F. Supp. at 352. Here, the parties do not dispute that the government's motives in using Agent Orange in southeast Asia were valid military objectives: defoliate jungle growth to deprive enemy forces of ground cover and destroy enemy crops to restrict enemy's food supplies. Unlike *Thornwell* and *Everett*, plaintiffs here do not allege that the government committed "an intentional act and then negligently fail[ed] to protect [them]", *Thornwell v. United States*, 471 F. Supp. at 352; *Everett v. United States*, 492 F. Supp. at 325. Accordingly, the facts at bar do not present the "third case" of the *Thornwell* analysis.

If this case fits within the *Thornwell* analysis at all, it is the "second case", where "a single negligent act occurs and its effects linger after discharge." 471 F. Supp. at 352. Despite all the inconsistencies pervading this difficult area of analysis, "it is clear, at the very least, that a mere act of negligence which takes place while the plaintiff is on active duty and which then remains uncorrected after discharge, is not grounds for suit". *Thornwell v. United States*, 471 F. Supp. at 351.

Plaintiffs' complaints here neither allege nor support a conclusion that the post-discharge failure to warn was sufficiently separate and distinct from the underlying "incident to service" tort claims. Moreover, the *Feres* doctrine bars claims that are not only "incident to service" but also those which, like these, "arise out of" military service. The injuries here alleged as "inseparably entwined" with, and directly related to, plaintiffs' military service, see *Healy v.*

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*United States*, 192 F. Supp. 325, 328 (S.D.N.Y. 1961), *aff'd on opinion below*, 295 F.2d 958 (C.A. 1961); *Kilduff v. United States*, 248 F.Supp. 310, 312 (E.D. Va. 1960); 1 Jayson, *Handling Federal Tort Claims* § 155.08[3][b] at 5-124. The important and well established principles of the *Feres* doctrine cannot be circumvented by inventive presentation or artful pleading which attempts to create an actionable post-discharge claim out of what is in reality a claim of continuing neglect. See *Thornwell v. United States*, 471 F. Supp. at 352.

## (c) The Australian Veterans' Claims

The above analysis applies with equal force to the claims of the Australian veterans.<sup>27</sup> The only reported case on point, *Daberkow v. United States*, 581 F.2d 285 (C.A.9, 1978), reached a similar conclusion. There, the claims of a West German serviceman, killed performing duties incident to joint military activity conducted by the United States and West German governments, were held barred under *Feres*. The *Daberkow* court undertook an analysis of the three "*Feres* factors" and concluded that *Feres* applies with equal force to foreign servicemen injured incident to joint military activities because: (1) the scope of the United States government's liability should not depend on the fortuity of the location of any serviceman's duty station, whether that serviceman is an American or foreign serviceman; (2) the foreign government there involved had provided a means of compensating veterans and their families

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<sup>27</sup> In *McMillan v. Dow*, CV 80-1143 (EDNY GCP), and *Elder v. Dow*, CV 80-1241 (EDNY GCP), 270 plaintiffs, all claiming to have been Australian war veterans who had served jointly with American Forces in Vietnam, seek damages for injuries caused by Agent Orange.

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for injuries incident to service; and (3) the possible disruption of military discipline resulting from servicemen's claims is similar whether the serviceman is American or not. 581 F.2d at 788.

Here, the claims of the Australian plaintiffs clearly fall within the *Daberkow* analysis. The Australian plaintiffs concede that their presence in southeast Asia during the period in question was the direct result of their country's participation in joint military operations with the United States, memorandum of Australian plaintiffs at 3, and they acknowledge the existence of a compensation scheme for Australian veterans similar to that provided by the United States government. Memorandum of Australian plaintiffs at 8. Moreover, to rule that the United States government has waived sovereign immunity with respect to the tort claims of foreign servicemen but not with respect to the claims of American servicemen would distort the underlying purposes of the FTCA, defy common sense, and almost certainly be contrary to the intent of an elected Congress. Since the court determines that the Australian veterans could not maintain an action directly against the United States, defendants in turn may not maintain their third party action for indemnity or contribution based on any recovery the Australian veterans may obtain from them. *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 97 S. Ct. 2054, 52 L. Ed.2d 665 (1977).

(d) Derivative Claims of Spouses, Parents and Children

Although the *Feres* doctrine does not apply to the servicemen's next of kin insofar as their own direct injuries or deaths are concerned, 1 Jayson, *Handling Federal Tort Claims* § 156 at 5-142 through 5-143 and cases cited therein, *Feres* does bar suits by serviceman's family for dam-

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ages resulting from injuries the serviceman suffered incident to service, 1 Jayson, *Handling Federal Tort Claims* § 156 at 5-144, even where the derivative action is technically personal in character (e.g., wrongful death, loss of consortium). *Van Sickel v. United States*, 285 F.2d 87, 91 (CA9 1969). This principle is demonstrated by *Feres* itself, where two of the three suits barred in that decision were wrongful death actions instituted on behalf of widows of servicemen who had died from injuries suffered incident to their service. *Feres v. United States*, *United States v. Griggs*, 340 U.S. 135, 71 S. Ct. 153, 95 L. Ed. 152 (1950). (Deciding appeals from *Feres v. United States*, 177 F.2d 535 (CA2 1949), and *Griggs v. United States*, 178 F.2d 1 (CA 10 1949)).

Further, application of this rule bars claims of mental anguish suffered by family members, *DeFont v. United States*, 453 F.2d 1239, 1240 (CA1 1972), *cert. denied*, 407 U.S. 910, 92 S. Ct. 2436, 32 L. Ed.2d 684 (1972) (wife's mental anguish over inadequate care provided serviceman husband not separate and distinct claim under *Feres*), and also bars the claims of veterans' spouses who allege damages that actually were the result of harm done to servicemen, *Harten v. Coons*, 502 F.2d 1363, 1365 (CA 10 1974), *cert. denied*, 420 U.S. 963, 95 S. Ct. 1354, 43 L. Ed.2d 441 (1975) (mother of accidentally conceived child cannot recover for negligent vasectomy performed on serviceman husband).

Applying these principles to the case at bar, it is clear that members of the veterans' families may not maintain actions against the United States based on their derivative claims (e.g., loss of society, comfort, companionship, services, consortium, guidance and support), or claims that result from a serviceman's injury (e.g., miscarriage). Ac-

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cordingly, under the principles of *Stencel Aero*, the defendants may not seek indemnity or contribution from the United States for any liability imposed on them for claims of this nature.

(e) Claims of Direct Injury to Veterans' Children

Only the veterans' children's claim of direct injury requires additional analysis. Here, children of Vietnam veterans allege that they have suffered genetic and somatic injury as a result of a parent having been exposed to Agent Orange. This presents the difficult question of whether the injuries suffered by these children, who are not and never were members of the military, are derivative injuries suffered "incident to or arising out of military service", or whether they are direct injuries independent of those of their parents.

The closest precedent is *Monaco v. United States*, No. C 79-0860 (N.D. Cal. Nov. 2, 1979), where plaintiff, the daughter of a serviceman exposed to radiation during his military service, claimed the government's negligence towards her father caused her to be affected with "chromosomal and genetic change" which in turn resulted in her being born with a birth defect. *Monaco v. United States*, slip op. at 3. There, the court held "[t]he test of *Feres* is whether plaintiff's injuries have as their genesis injuries allegedly sustained incident to the performance of military service", slip op. at 3, and found plaintiff's claim barred under this standard because "[plaintiff's] injuries are directly related to and arise out of the injury sustained by her father at the time he was a member of the United States Army." Slip op. at 4.

In the case at bar, the children's claims of genetic and physical harm are indirect because they arise only as the

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result of injuries to their veteran parents.<sup>28</sup> The injuries alleged by the children had their genesis in the exposure of their parents and, assuming that Agent Orange could produce the genetic changes alleged, the injuries were inflicted on the serviceman at the time of exposure. Thus, although Agent Orange may ultimately be found to have caused injuries in subsequently conceived children, those injuries, nevertheless, arose out of and were incident to the service of the parent. To hold otherwise might open the door for governmental liability to countless generations of claimants having ever diminishing genetic relationship to the person actually injured.

For these reasons, the court holds that the children's claims for genetic injury and birth defects from Agent Orange exposure of their veteran parents are injuries suffered "incident to and arising out of service" under *Feres* and cannot be recompensed in an action maintained directly against the government. Consequently, the defendants may not seek indemnity or contribution against the United States for any liability they ultimately may incur as a result of these claims. *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 97 S. Ct. 2054, 52 L. Ed.2d 665 (1977).

G. DEFENDANTS' REMAINING CLAIMS AGAINST THE UNITED STATES

Defendants have sought to style the remaining claims of their third party complaints in terms of constitutional

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<sup>28</sup> Somewhat analogous is *Harten v. Coons*, 502 F.2d 1363 (CA 10 1974), *cert. denied*, 420 U.S. 963, 95 S. Ct. 1354, 43 L. Ed. 2d 441 (1975), where a serviceman and his wife sued the United States for the costs of raising a child accidentally conceived after a negligent vasectomy on the husband. There, the court considered only the damage done to the husband and dismissed the complaint under *Feres* without regard to the wife's claim of independent injury. 520 F.2d at 1364.

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deprivation and torts committed directly against them by the United States. This appears to be another exercise in pleading in an attempt to avoid statutory jurisdictional problems because, notwithstanding the defendants' characterizations, these remaining claims against the government are not tort claims; rather, they are essentially contractual in nature and must be so treated.

Congress has conferred on the courts jurisdiction over contract claims that is different from that over tort claims. Under the Tucker Act, 28 U.S.C. § 1491, jurisdiction for any claim founded upon an express or implied contract with the United States is conferred on the Court of Claims, where cases sounding in tort may not be maintained. The United States District Courts have concurrent jurisdiction over contract claims, but only when the claim does not exceed \$10,000. 28 U.S.C. § 21346(a)(2). Here, it is beyond dispute that defendants' remaining third party claims against the government involve more than \$10,000 that deprives this court of jurisdiction over them. Consequently, the government's motion to dismiss must be granted as to the remaining claims. Of course, dismissal of defendants' third party claims here is without prejudice to defendants' right to pursue their claims against the government in the proper forum.

#### H. OTHER CLAIMS OF IMMUNITY

Arguing in the alternative, the United States seeks to dismiss defendants' third party complaints under three statutory exceptions to the FTCA: the combatant exception, 28 U.S.C. § 2680(j) (immunity not waived for "[a]ny claim arising out of the combatant activities of the military \* \* \* during time of war"); the foreign country exception, 28 U.S.C. § 2680(k) (immunity not waived for "any claim



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arising in a foreign country"); and the discretionary function exception, 28 U.S.C. § 2680(a) (immunity continues for "act or omission of an employee of the government \* \* \* based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of [the government]").

Notwithstanding the apparent application of these exceptions to some of the claims here asserted, the court's determination that the *Feres/Stencel* doctrine operates to bar all tort claims advanced in the third party complaint makes it unnecessary to consider whether these exceptions do apply.

For all these reasons, the government's motion to dismiss the third party complaints is granted, and the third party complaints against the government deemed to have been made in all actions under MDL 381, are dismissed.<sup>29</sup>

### III. THE CASE MANAGEMENT PLAN

There have been pending for some time motions by various parties urging the court to make various orders affecting the overall management of this action, including such matters as class action treatment, summary judgment, discovery, and division of the action into various parts for pretrial and trial purposes. The court has reserved decision

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<sup>29</sup> Plaintiffs are cautioned that the issues here are, to some extent, novel, and the strong arguments advanced by all parties should make it clear that the views expressed and rulings made in this decision are not entirely free from doubt. Accordingly, any plaintiff who believes that [s]he may have a valid claim against the United States government in the event that one or more of the above rulings are ultimately reversed on an appeal from this court's decision, should protect his/her interests to the greatest extent possible by filing a notice of claim form (Standard Form 95) with the proper agency of the United States government and taking whatever additional steps may be necessary to protect his/her rights.



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on all these motions pending resolution of two major questions that greatly affect how the case might be managed efficiently: (1) whether the United States was to be a party to the action, and (2) whether jurisdiction lies under federal common law or whether the principles and consequences of diversity jurisdiction must be considered. Now that both of these questions have been answered,<sup>30</sup> it is time to get on with orderly discovery and ultimate disposition of the litigation.

In developing the case management plan described in this section, the court has weighed and considered many problems presented by this litigation. Some of them are:

1. There are a large number of plaintiffs and potential plaintiffs who claim to have been injured by exposure to Agent Orange. There are now approximately 167 suits pending in the Eastern District of New York involving over 3,400 plaintiffs. The court has been informed that there

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<sup>30</sup> The first question is answered by the earlier part of this memorandum and order. The second question was answered by a decision and order of the Second Circuit Court of Appeals dated November 24, 1980 (Feinberg, C. J. dissenting) which held that this litigation should not be governed by federal common law, but rather must be controlled by the laws of the several states applied under diversity of citizenship principles. Technically, that question is still open because plaintiffs have filed a petition for en banc consideration by the Second Circuit. In addition, plaintiffs have indicated their desire to have the issues reviewed by the United States Supreme Court. However, enough light has now been shed on the problems to permit substantial progress in the trial court regardless of future actions by the Second Circuit or the Supreme Court. Managing this case under diversity of citizenship principles is by far the more difficult route to travel, but the court feels that it can develop a plan for efficient management even without the aid of federal common law for jurisdiction and for substantive law purposes. If further review of the federal common law issue produces a change, then the remaining work of the court and of all parties will be simplified and the management plan can be easily adapted at that time.

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are many thousands more who have, at the court's request and pending decision of the class action motion, refrained from bringing individual actions.

2. There are numerous chemical companies named as defendants.<sup>31</sup> The fact that they may have had differing degrees of involvement in manufacturing and supplying Agent Orange for the government may or may not cause differing levels of responsibility for the effects of Agent Orange on plaintiffs.

3. The present plaintiffs come from most of the 50 states and from Australia. This may require consideration of varying standards of conduct, rules of causation and principles of damages that may substantially affect the results in individual cases.

4. The causation issues are difficult and complex. Clearly this is not the "simple" type of "disaster" litigation such as an airplane crash involving a single incident, having a causation picture that is readily grasped through conventional litigation techniques, and presenting comparatively small variations among the claimants as to the effects upon them of the crash. With the Agent Orange litigation, injuries are claimed to have resulted from exposure to a chemical that was disseminated in the air over southeast Asia during a period of several years. Each veteran was exposed differently, although undoubtedly patterns of exposure will emerge. The claimed injuries vary significantly. Moreover, there is a major dispute over whether Agent Orange can cause the injuries in question, and there are separate disputes over whether the exposure claimed in each case did cause the injuries claimed. The picture is further

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<sup>31</sup> See footnote 2 *supra*.

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complicated by the use in Vietnam of other chemicals and drugs that also are claimed to be capable of causing many of the injuries attributed to Agent Orange.

5. The litigation presents numerous questions of law that lie at the frontier of modern tort jurisprudence. Among them are questions of enterprise liability, strict products liability, liability for injuries that appear long after original exposure to the offending substance, and liability for so-called genetic injuries.

6. Many of the people exposed to Agent Orange may not even yet have experienced the harm it may cause.

7. Numerous scientific and medical issues are presented, and there are serious questions of whether there is adequate data to reach scientifically sound conclusions about them. There is the further question of whether legally permissible conclusions may nevertheless be reached on data that would not permit "scientific" conclusions.

8. Various agencies of the government have expressed concern but as yet have shown little tangible action about the problems claimed to have been caused by the government's use of Agent Orange.

9. There are important and conflicting public policies that run as crosscurrents through many phases of both the substantive and procedural problems of this litigation.

10. There is a wide choice available among the many procedural devices that could be used for addressing and ultimately deciding this controversy.

All of these problems are compounded by the practical realities of having on one side of the litigation plaintiffs who seek damages, but who have limited resources with which to press their claims and whose plight becomes more

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desperate and depressing as time goes on, and having on the other side defendants who strenuously contest their liability, who have ample resources for counsel and expert witnesses to defend them, and who probably gain significantly, although immeasurably, from every delay that they can produce.

Overarching the entire dispute is a feeling on both sides that whatever existing law and procedures may technically require, fairness, justice and equity in his unprecedented controversy demand that the government assume responsibility for the harm caused our soldiers and their families by its use of Agent Orange in southeast Asia.

Out of these and other problems it is this court's task as the transferee judge in this multidistrict litigation to supervise and manage the action so as to bring it to a "just, speedy and inexpensive determination", Rule 1 FRCP, either in this court, or if that is not possible, then in the transferor courts after completion here of as much of the litigation as may fairly and reasonably be resolved under the supervision of this single judge.

With the foregoing and other problems in mind, the court has considered a variety of possibilities for managing this multidistrict litigation. Each possibility has both advantages and disadvantages. Among the numerous possibilities are the following:

1. Transfer all actions to the Eastern District of New York for trial before this court.

- a. Advantages: All parties would know precisely where they stand, and how the action would be handled. There would tend to be consistency in the results to the extent permitted by the varying applicable laws.

- b. Disadvantages: Handling the cases would take the full time of this court, which would be able to handle no

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other cases, a result that would be unfair not only to the other judges in the Eastern District of New York who are already overburdened with one of the heaviest criminal workloads in the nation, but also to other civil litigants in the Eastern District, who would be further delayed in getting their cases to trial. Moreover, to separately try these actions would take far too long a time; probably neither the litigants nor this court would live long enough to see the last case tried.

2. Supervise all discovery, prepare a pretrial order, and then remand the cases for separate trials in the transferor districts around the country.

a. Advantages: This is by far the easiest course of action for this court to take. In many MDL cases this is an acceptable and proper technique and achieves all of the MDL benefits available to those cases. It accomplishes coordinated discovery, a single plan for processing up through the pretrial order, and a shared workload in the actual trial of the individual actions.

b. Disadvantages: This technique would require separate trials of each action in the transferor courts, a technique that would be repetitious and wasteful with respect to the issues that are common to all actions. Although testimony of key expert witnesses might be made available to each of the transferor courts through use of videotape so that the need for those witnesses to personally appear at each trial would thereby be eliminated, the opportunity to cross-examine the experts on special problems that relate to the individual plaintiffs would still be lost. The greatest disadvantage of this method is that it would place unnecessary burdens on each of the transferor judges, each of whom would have to struggle with identical legal and factual

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issues, and it would thus fail to reach the level of judicial efficiency and economy that MDL procedures were designed to achieve.

3. Coordinate discovery and other pretrial work, consolidate the actions for trial of the common issues of fact and law, and then remand to the transferor districts for separate trials of the individual issues such as specific causation and damages.

a. Advantages: A single trial of common issues has obvious benefits in economy and efficiency. Spreading to other courts the workload of trying individual cases at least makes a judicial solution to this litigation possible in terms of time and workloads.

b. Disadvantages: The consolidation technique addresses only the pending actions, that is, it involves those situations where the plaintiff has seized the initiative and brought suit. However, there are many people with valid claims who for one reason or another have not asserted them by bringing suit and who would therefore not recover for damages inflicted, including damages of which they might not yet even be aware.

4. Certify the litigation as a class action, using all the flexibility of that device, including subclasses, to determine common issues before this court and ultimately determine the individual issues either under the direct supervision of this court or after remand to other courts.

a. Advantages: Class action treatment would give this court full control over the entire litigation. Any determinations reached in the class action would bind all defendants as well as all members of the class except those who chose to opt out, and as to them, their suits could be consolidated

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for joint trial with the class action. By use of subclasses to be certified as the need later arises, additional trials on issues common to indentified subclasses may be conducted either here in the Eastern District of New York, or by the transferor courts after remand, or by a combination of both. This method provides the greatest flexibility and the greatest opportunity for judicial efficiency and economy of time and money.

b. Disadvantages: The disadvantages with class action treatment lie largely in technical and procedural problems that have arisen with the class action device in other contexts. Such problems have proved particularly troublesome in the context of mass tort cases. Having considered carefully the nature of those technical problems, this court is satisfied that they can be overcome by following the case management plan described in this section and the steps described under the section entitled "Class Action".

After considering the submissions and arguments of the parties and after weighing all of the foregoing and many other considerations, the court has developed the following plan for management of the Agent Orange litigation assigned to it under MDL No. 381:

1. Class action. The Agent Orange litigation will be certified as a class action under F.R.C.P. 23(b)(3). (See discussion below entitled "Class Action").

2. Statutes of limitations. The court will take up immediately the problems of statutes of limitations. (See discussion below entitled "Statutes of Limitations").

3. Separate trials of some issues. Whenever common issues are presented, a common trial should be had, if practicable. These trials will be held as promptly as pos-



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sible in the Eastern District of New York, preserving at all times the parties' right to a jury trial when properly demanded. Plaintiffs have moved for so-called "serial" trials, describing in some detail the issues they would like tried and the order in which they should be tried. Except insofar as plaintiffs' plan is adopted by this decision, that motion is denied. As appears in the discussion below entitled "Summary Judgment" there is an issue that can be separately tried at the threshold of this action: whether the defendants are protected by the "government contract defense". The court intends to try that issue separately. After that, if needed, there may be an additional trial addressing liability questions such as negligence, product liability, and general causation, where a jury will be able to hear all of the evidence relating to the development, manufacture and use of Agent Orange, and the scientific and medical evidence relating to its potential effects, and report its findings in carefully drafted special verdicts. Those special verdicts can then serve as a framework for later disposition of the issues of individual causation (whether a particular veteran was exposed, to what degree, and with what results) and damages. The court has not yet determined whether the individual issues can be best resolved under the direct supervision of this court or by remand of subclass actions to transferor courts for processing in ways appropriate to the circumstances of the subclasses. Those determinations necessarily must be made at a later date.

4. **Discovery.** Until now the court has stayed all discovery except that conducted voluntarily. That stay will now be lifted, and mandatory discovery shall now proceed according to the plan described in the section below entitled "Discovery".



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a. Plaintiffs' motion to amend the complaint by adding the United States government and many of its officials on a theory of constitutional tort is denied. The issues sought to be raised by plaintiffs through the amendment are sufficiently different from those presented by this already complex litigation to require that the constitutional claims against government officials and the government itself be pursued by one or more separate actions, if plaintiffs are so inclined. Denial of the motion, therefore, is without prejudice to whatever rights plaintiffs may have to assert those claims in separate proceedings.

b. Jurisdiction and pleadings. There is some confusion as to the precise state of the pleadings in the many pending actions. The court has not yet determined what precise disposition will be made of the various individual actions in light of the class certification. Unless a party files in a particular action a notice disclaiming the benefit afforded by the following, all of the pleadings in all cases now or hereafter filed under MDL 381 are deemed amended as follows:

1. The complaints are deemed amended to allege the residence of the plaintiffs, and to name and allege the residence of each of the defendants whose citizenship is diverse from that of the plaintiff. All plaintiffs are deemed to have joined all diverse defendants as defendants in their individual actions.

2. All defendants are deemed to have answered all complaints brought against them, with general denials plus all affirmative defenses thus far raised in filed answers to any of the Agent Orange MDL cases. All answers are deemed to include crossclaims for indemnification and con-

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tribution against all other defendants. All crossclaims are deemed denied.

The court recognizes that (1) any case management plan may have to be changed in order to adapt to new or unforeseen circumstances; (2) not every facet of the plan adopted for this Agent Orange litigation will please everyone; and (3) this litigation presents problems of a type and magnitude that differ substantially from the established precedents so that it cannot proceed in one of the well established patterns for lawsuits. Under these circumstances, it is the court's obligation to control the case, seeking always the goal of a "just, speedy and inexpensive determination" of the litigation.

Lawsuits, of course, must be guided and decided by the principles of substantive law and rules of procedure established by Congress, by the legislatures of the various states, and by the principles of common law where applicable. The rules of procedure, however, are not intended to require rigid adherence to peordained steps; instead, they are standards and requirements to be used, molded and adapted so as to achieve just, speedy and inexpensive determination of lawsuits. Although "speedy" and "inexpensive" are relative terms having almost ironic implications in the context of the Agent Orange litigation, this court is satisfied that the plan described will, with the cooperation of counsel, attain at least a "just" determination of these lawsuits, and will do so at less cost and in less time than would a more conventional approach.

#### IV. CLASS ACTION

Contending that many of the issues here presented are best determined by class action to avoid duplicitous litigation by the individual members of the proposed class, plain-

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tiffs have moved for a conditional order pursuant to F.R.C.P. 23 permitting the suit to proceed as a class action on behalf of all persons exposed to Agent Orange and various members of their families. Under Rule 23(c)(1) and 23(d), the order would be subject to such later modification as the court may find appropriate and necessary in light of future developments in the case.

Before a class action may be maintained under Rule 23, the action must meet the prerequisites of Rule 23(a) and one set of the alternate requirements of Rule 23(b). Defendants oppose class treatment, but continue to advance some outrageous arguments in the name of advocacy; detracting from whatever valid arguments they might otherwise have, they argue that plaintiffs fail to satisfy even one of the elements necessary under Rule 23. Plaintiffs, equally indiscriminating in their advocacy, argue that *every* element of *every* alternative of Rule 23 is met here.

The court has carefully read and considered the voluminous submissions of the parties and has heard and considered oral arguments of counsel on this issue. After due consideration, the court determines that plaintiffs have demonstrated that a class action is appropriate under Rule 23(b)(3). Accordingly, plaintiffs' motion for conditional class action certification is granted as herein provided. Certain specific findings are required.

**A. THE PREREQUISITES OF RULE 23(a).**

**1. Numerosity**

The members of the plaintiff class here are so numerous that joinder of all members of the class in the same action is impracticable. Rule 23(a)(1). Indeed, if the only members of the class were the plaintiffs in the 167 actions now pending in this court, "numerosity" would be satisfied.

*Opinion of the District Court Dated December 29, 1980***2. Commonality**

Rule 23(a)(2) states that a class action may only be maintained if "there are questions of law or fact common to the class." Here, the action raises numerous questions of law *and* fact common to the class. Whatever may be the individual questions relating to the manner and extent of each veteran's exposure to Agent Orange, and relating to the particular effects of Agent Orange on the veteran when considered along with his/her medical history, circumstances, lifestyle and other unique conditions, all of these claims share a common ground when proceeding through the many factual and legal issues relating to the government contract defense, negligence by the defendants, whether Agent Orange was a "defective product", and the many questions embodied in the concept of "general causation". In part, the requirement of commonality is one aimed at determining whether there is a need for combined treatment and a benefit to be derived therefrom. Here the need is compelling, and the benefits are substantial.

**3. Typicality**

Rule 23(a)(3) requires that in a class action "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class." As already noted, plaintiffs' claims of negligence, products liability and general causation, as well as the defendants' government contract defense are not just "typical" of the entire class, they are identical. In a few areas, such as the rules governing liability and the application of various statutes of limitations, the claims may fall into groups that are "typical", but even there the different groups' claims can be efficiently managed either on a subclass basis or directly by way of separately determining the issues. Although the named plaintiffs for

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purposes of the class action are yet to be designated, the court is satisfied that out of the extremely large pool available representative plaintiffs can be named who will present claims typical of those of the class. As already indicated, the issues of specific causation and damages will, of course, ultimately require individual consideration, but until that point in the litigation is reached, a class action appears to be the only practicable means for managing the lawsuit.

#### 4. Adequacy

Rule 23(a)(4) provides that a class action may only be maintained if "the representative parties will fairly and adequately protect the interests of the class." Adequacy of representation depends on the qualifications and interests of counsel for the class representatives, the absence of antagonism or conflicting interests, and a sharing of interests between class representatives and absentees. 7 Wright & Miller *Federal Practice and Procedure* §§ 1765-1769 at 615-657. Here, the court will select from among the hundreds of plaintiffs representative persons who have a substantial stake in the litigation, who lack conflicts, antagonisms or reasons to be motivated by factors inconsistent with the motives of absentee class members, and who will fairly and adequately protect the interests of the class. Further the class will be represented by experienced, capable counsel, Yannacone and Associates,<sup>32</sup> who have shown

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<sup>32</sup> Yannacone and Associates is a consortium of lawyers who have banded together for purposes of this lawsuit under the leadership of Victor Yannacone, who brought the initial actions and who designated as lead counsel for the plaintiffs shortly after the cases were transferred to this court by the multidistrict panel. Some of the lawyers in the consortium represent plaintiffs in one or more of the component Agent Orange actions; others apparently have been

(footnote continued on following page)

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themselves willing to undertake the considerable commitment of time, energy and money necessary for the vigorous prosecution of the claims here asserted.

### 5. Additional Requirements

Courts have implied two additional prerequisites to class action certification that are not specifically mentioned in Rule 23: (1) there must be an identifiable class, and (2) the class representatives must be members of the class. 7 Wright and Miller *Federal Practice and Procedure* §§ 1760, 1761 at 579-592. Here, the plaintiff class can be readily identified; they are persons who claim injury from exposure to Agent Orange and their spouses, children and parents who claim direct or derivative injury therefrom. The court has intentionally defined the class in broad terms consistent with the demands of this litigation. If we begin with the broadest possible class, the issues common to all members of that class can be resolved. It may later prove advantageous to create subclasses for various purposes, *e.g.*, for resolving statute of limitations claims, for determining liability in "negligence" as opposed to "product liability" states, and finally, perhaps, for preserving the class action format prior to remand to the transferor judges so as to provide them with the greatest possible flexibility in ultimately determining the issues remaining after multi-district treatment has ended.

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*(footnote continued from preceding page)*

brought into the group because of special expertise and experience. This case is too complex and too demanding for any single attorney to handle it on behalf of plaintiffs. Yannacone and Associates has already demonstrated that the combined efforts of its twenty or so members will fairly and adequately protect the interests of the class and that together they have the expertise and desire to prosecute this demanding action properly.

*Opinion of the District Court Dated December 29, 1980***B. THE REQUIREMENTS OF RULE 23(b)**

Plaintiffs seek certification of a plaintiff class under Rule 23(b)(1)(A), (b)(1)(B), (b)(2) & (b)(3).<sup>33</sup> For the reasons set forth below, however, the court concludes that class certification is appropriate only under Rule 23(b)(3).

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<sup>33</sup> Rule 23(b) provides that an action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any question affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.



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## 1. Rule 23(b)(1)

Rule 23(b)(1), the "prejudice" class action provision, authorizes class action treatment if some prejudice would result to any party if members of the class were required to litigate their claims in a series of individual actions, and the resulting prejudice can be obviated by using a class action. The provision is broken down into two separate clauses.

Rule 23(b)(1)(A) authorizes a class action when the prosecution of separate actions would create a risk of "inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class". This section focuses on the difficulties that class action certification may visit on the party opposing the class action. It is designed to prevent situations in which different courts establish "incompatible standards of conduct" for that party.

Rule 23(b)(1)(A) is *not* meant to apply, however, where the risk of inconsistent results in individual actions is merely the possibility that the defendants will prevail in some cases and not in others, thereby paying damages to some claimants and not others. *McDonnell Douglas Corporation v. United States District Court, Central District of California*, 523 F.2d 1083, 1086 (CA9 1975), *cert. denied sub nom., Flanagan v. McDonnell Douglas Corporation*, 425 U.S. 911, 96 S. Ct. 1506, 47 L. Ed. 2d 761 (1976). "The risk of paying money [damages] to some and not others is not what the rule-makers intended by the words 'incompatible standards of conduct'". A Miller, *An Overview of Federal Class Actions: Past, Present and Future* at 43 [1977]. Since the only effect of inconsistent decisions here would be the payment of damages to some claimants and not others, class certification under Rule 23(b)(1)(A) would be inappropriate.



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Rule 23(b)(1)(B) authorizes a class action when separate actions would create a risk of "adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interest of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interest." This rule emphasizes possible undesirable effects on the class members, rather than on the opposing party, and permits a class action if separate suits might have undesirable effects on the class members. "The paradigm Rule 23(b)(1)(B) case is one in which there are multiple claimants to a limited fund \* \* \* and there is a risk that if litigants are allowed to proceed on an individual basis those who sue first will deplete the fund and leave nothing for the late-comers." A. Miller *An Overview of Federal Class Actions: Past, Present and Future* at 45 (1977). See also *Administrative Committee's Note, Rule 23*, 39 F.R.D. 69, 101 (1966).

However large the potential damages may appear here, plaintiffs offer no evidence of the likely insolvency of defendants and apparently do not, in defendant Dow's words, "have the temerity to argue that the aggregate claims of the purported class exceed the total assets of the five named defendants." <sup>34</sup> Defendant Dow's memorandum in opposition to class certification at 20. For good measure, Dow adds "[s]uch an argument would be ludicrous on its face." *Id.* As one court has noted, "without more, numerous plaintiffs and a large *ad damnum* clause should [not] guarantee (b)(1)(B) certification." *Payton et al. v. Abbott Labs et al.*, 83 F.R.D. 383, 389 (D. Mass. 1979). Thus, certification under Rule 23(b)(1)(B) is not appropriate.

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<sup>34</sup> Since that statement was made the number of named defendants has increased, see footnote 2 *supra*, thus rendering class certification under Rule 23(b)(1)(B) even more inappropriate.

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2. Rule 23(b)(2)

Rule 23(b)(2) authorizes class action treatment where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." This subdivision "does not extend to cases in which the appropriate final relief relates exclusively or predominately to money damages", *Advisory Committee's Note, Rule 23*, 39 F.R.D. 69, 102 (1966); rather, it applies when injunctive relief or declaratory relief on which injunctive relief could be based is proper. *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 564 (CA 2 1968), *vacated on other grounds*, 417 U.S. 156, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974). Here, the relief requested relates predominately to money damages so the class may not be certified under Rule 23(b)(2).<sup>35</sup>

3. Rule 23(b)(3)

Rule 23(b)(3) authorizes a class action when the court finds "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to all other available methods for the fair and efficient adjudication of the controversy." The rule lists four matters pertinent to a consideration of these issues: "(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the

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<sup>35</sup> The court is aware that plaintiffs have requested that a trust be established to apply defendants' future profits for the benefit of the plaintiff class. While this possible relief has not been excluded from the case, it does not serve as a sufficient basis for class certification pursuant to F.R.C.P. 23(b)(2).

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extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or un-desirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

Considering the circumstances of this action, and bearing in mind the manner in which the class action will proceed, the court determines that the interest of class members in individually controlling the prosecution of separate actions is minimal, especially at this early stage of the litigation when the issues under consideration concern the relationship between the defendants and the government, issues that impact equally on every plaintiff's claim. Rule 23(b)(3)(A). Later stages of this litigation, especially those concerned with individual causation and damages, may require reconsideration of this element and possibly decertification, but at this stage, individual class members have almost no interest in individually controlling the prosecution of separate actions. Indeed, the problems inherent in every one of the individual actions are so great that it is doubtful if a single plaintiff represented by a single attorney pursuing an individual action could ever succeed.

With respect to the extent and nature of currently pending litigation, almost all the Agent Orange litigation currently pending is before this court under the multidistrict litigation procedures. All those cases are advancing simultaneously, and certification of a class action will serve the goals of judicial economy and reduce the possibility of multiple lawsuits. Rule 23(b)(3)(B). In addition, it will significantly expedite final resolution of this controversy.

With respect to the desirability of concentrating the litigation of the claims in this forum, the actions have

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already been concentrated before this court through the use of MDL procedures. Allowing it to proceed as a class action will minimize the hazards of duplicate efforts and inconsistent results. Moreover, given the location of present counsel and the widely varying citizenships of the interested parties, this court is as appropriate a place to settle the controversy as any. Rule 23(b)(3)(C).

With respect to the difficulties likely to be encountered in the management of a class action, the court has carefully and humbly considered the management problems presented by an action of this magnitude and complexity, and concluded that great as they are, the difficulties likely to be encountered by managing these actions as a class action are significantly outweighed by the truly overwhelming problems that would attend any other management device chosen. While the burdens on this court might be lessened by denying class certification, those imposed collectively on the transferor courts after remand of the multidistrict cases would be increased many times.

Having carefully considered the above factors and all other circumstances of this action, the court is satisfied that at this time the questions of law and fact common to the members of the class predominate over questions of law or fact affecting only individual members, and that a class action is superior to any other available method for the fair and efficient adjudication of the controversy.<sup>36</sup>

Because over a year ago this court requested plaintiffs not to file actions pending decision on the class action motion, because the facts and issues in all of the pending and future

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<sup>36</sup> There being no need to certify subclasses of plaintiffs at this time, the court will postpone consideration of the subclass issues to a later time when the most efficient and logical course to follow will be clearer.

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cases are to a great degree identical, or at least parallel, and because this action presents a variety of questions in relatively untested areas of the law, this court sees the objectives of F.R.C.P. Rule 1 and Rule 23, as well as the interests of justice, best served by determining here, and for all parties, as many legal and factual issues as may properly be decided. To achieve those ends the court will certify this to be a class action under F.R.C.P. 23(b). Formal certification will be by separate order to be processed under the court's instructions.

**C. NOTICE**

Rule 23(c)(2) states that "In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."

Two problems with notice must be considered: how the notice shall be given and what the notice shall say. In the order to be prepared and signed which will officially certify the class, the court will direct both the manner and content of notice.

As to the manner of notice, both the rule and the court decisions display a preference for individual notice whenever possible, and ordinarily the financial burden of giving notice falls on the plaintiffs. Individual notice to all members of the broad class to be certified may be impossible. The rule requires, however, only "the best notice practicable under the circumstances". Counsel are invited to submit suggestions in writing as to how "the best notice practicable" may be given to the over two million Vietnam veterans and their families who are included in the class by January 23, 1981.

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Certain possibilities have already been suggested, including having the Veterans Administration mail copies of the notice to all Vietnam veterans on their mailing list, and soliciting the aid of veterans' organizations around the country to circularize their memberships.

It may be that other persons or organizations are willing to assist in resolving the notice problem. The news media in particular might volunteer space or time to assure "the best notice practicable" to veterans and their families. Still other means by which the notice requirement can be fairly and reasonably fulfilled may exist. After considering all suggestions received by January 23, 1981, the court will determine how notice shall be given.

As to the form of notice, Yannacone and Associates is directed to serve and file by January 7, 1981 a proposed form of notice which shall include at least the following information in as simple and direct a form as possible:

1. It shall state briefly the nature of plaintiffs' suit, their causes of action and their claims for relief.
2. It shall set out the definition of the plaintiff class and in general terms the issues that will have to be determined.
3. It shall notify the recipient that at his/her request the court will exclude him/her from the class so long as the request is received by a date specified in the notice that counsel and the court will set Rule 23(c)(2)(A).
4. It shall make clear that any findings, whether favorable or not, will be binding on all class members who do not request exclusion. Rule 23(c)(2)(B).
5. It shall explain that any class member who does not request exclusion may enter an appearance through his/her counsel. Rule 23(c)(2)(C).

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Counsel for defendants shall meet on or before January 16, 1981 to discuss and, if possible, agree upon suggested modifications to plaintiffs' proposed form of notice and serve and file their suggested changes, if any, with the court by January 23, 1981. To the extent that agreement among defense counsel is not possible, they may make separate submissions.

By January 16, 1981 Yannacone and Associates shall submit to the court a list of no more than 12 persons whom they propose as representative plaintiffs for the class action. Defendants may, if they choose, submit any comments, objections or suggestions with respect to the proposed representative plaintiffs by January 23, 1981. The court will then determine who will be the named plaintiffs in the class action, and plaintiffs' attorneys will be directed by further order of this court to prepare an appropriate class action order and class action complaint.

## V. SUMMARY JUDGMENT

On this motion, defendants argue that they are entitled to summary judgment against plaintiffs because, acting under compulsion of federal law, they were forced to manufacture Agent Orange under circumstances carefully controlled by the government. Cases analyzing similar arguments have utilized various terminology to describe this defense, the most common being that defendants seek to "share in the government's immunity", *Green v. ICI America, Inc.*, 362 F. Supp. 1263, 1264 (E.D. Tenn. 1973), or that defendants assert a "government contract defense". See *Merritt, Chapman & Scott Corporation v. Guy F. Atkinson Company*, 295 F.2d 14, 16 (CA9 1961).

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Whatever its label, the government contract defense<sup>37</sup> in this case essentially seeks to avoid manufacturer liability on the ground that the circumstances surrounding Agent Orange's manufacture and use were controlled and dictated by the United States government acting in a capacity in which the government is protected from liability by sovereign immunity and the *Feres/Stencil* doctrine.

In the seminal case of *Yearsley et al. v. W. A. Ross Construction Company*, 309 U.S. 18, 60 S. Ct. 413, 84 L. Ed. 554 (1940), the Supreme Court recognized the possibility that contractors who properly perform their work pursuant to contracts with the United States government might avoid liability for injuries resulting from the work done. Plaintiff, who sought to recover damages for erosion of his waterfront property caused by defendant's construction of dikes in the Missouri River, conceded that defendant had acted "pursuant to a contract with the United States Government, under the direction of the Secretary of War and the supervision of the Chief of Engineers of the United States, for the purpose of improving navigation of the Missouri River." 309 U.S. at 19, 60 S. Ct. at 414. The Court held that the contractor was not liable, because the work done had been properly authorized and properly performed. Summarizing the relevant principles, the Court stated

[I]t is clear that if [the] authority to carry out the project was validly conferred \* \* there is no liability on the part of the contractor for executing [the government's] will. (citations omitted). Where an

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<sup>37</sup> For purposes of convenience this defense will be called the "government contract defense" for the remainder of this decision.



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agent or officer of the Government purporting to act on its behalf has been held to be liable for his conduct causing injury to another, the ground of liability has been found to be either that he exceeded his authority or that it was not validly conferred. 309 U.S. at 20-21, 60 S. Ct. at 414.

Following these principles, subsequent cases have stated the rule in various ways:

To the extent that the work performed by [the contractor] was done under its contract with the [government], and in conformity with the terms of said contract, no liability can be imposed upon it for any damages claimed to have been suffered by [plaintiffs]. *Myers v. United States*, 323 F.2d 580, 583 (CA9 1963);

The [contract work] was pursuant to validly conferred authority under a contract [with the government]. The question of foreseeability of harm and the possible need to protect against it arose when the government framed its terms. There is no charge that what the contractor did was not what it was required to do. \* \* [The question of taking measures to safeguard against harm caused by the plans] was a decision which rested with the Government. The Government did not provide for such additional precautions in the plans and the [contractor] is not to be held liable for this omission. *Dolphin Gardens, Inc. v. United States*, 243 F. Supp. 824, 827 (D. Conn. 1965);

Where the act, or failure to act, which causes an injury is one which the [government] contractor was employed to do, and the injury results not from the negligent manner of doing the work, but from the

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performance thereof or failure to perform it at all, the contractor is entitled to share the immunity from liability which the public enjoys, but \* \* \* the contractor is not entitled to the immunity of the public body from liability where the injury arises from the tortious manner of performing the work." *Green v. ICI America, Inc.*, 362 F. Supp. 1263, 1265 (E.D. Tenn. 1973) quoting 9 A.L.R.3d 382, 385 (1966).<sup>38</sup>

Behind the rule lie considerations of fairness and public policy. First, tort liability principles properly seek to impose liability on the wrongdoer whose act or omission causes the injury, not on the otherwise innocent contractor whose only role in causing the injury was the proper performance of a plan supplied by the government. The imposition of tort liability on a wrongdoer can have a strong prophylactic effect; tortfeasors held liable for damages that flow from their wrongdoing have a strong incentive to prevent the occurrence of future harm. See W. Prosser, *Law of Torts* § 4 at 23 (4th ed. 1971). Before any societal benefit can be derived from the deterrent effects of tort liability, however, the party in a position to correct the tortious act or

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<sup>38</sup> See also *Merritt, Chapman & Scott Corp. v. Guy F. Atkinson Company*, 295 F.2d 14, 16 (CA9 1961) ("where the plans and specifications were drawn and adopted prior to the contract \* \* \* the contractor is entitled to follow such plans and specifications, exercising due and proper care and skill, and require parties damaged to look to the government, which has required such a contract, for relief.") (emphasis in original); *O'Grady v. City of Montpelier*, 474 F. Supp. 186, 188 (D. Vt. 1979), *rev'd on other grounds*, 573 F.2d 747 (CA2 1978) (no action lies against contractor who entered contract with city, performed work in accordance with detailed specifications provided by the city, did not act outside scope of authority, and performed work in non-negligent manner).

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omission be held accountable for the damages caused and thus motivated to prevent future torts.

Second, the policy considerations that lend continuing vitality to governmental immunity argue for "extension" of that freedom from liability to some government contractors. As one court put it:

To impose liability on the contractor [for the government's planning failures] would render the Government immunity \* \* \* meaningless, for if the contractor was held liable, contract prices to the Government would be increased to cover the contractor's risk of loss from possible harmful effects of complying with decisions of [governmental] officers authorized to make policy judgments. *Dolphin Gardens, Inc. v. United States*, 243 F. Supp. 824, 827 (D. Conn. 1965).<sup>39</sup>

These considerations take on increased significance when the government contracts with manufacturers of military ordnance in war time. Where, as here, manufacturers claim to have been compelled by federal law to produce a weapon of war without ability to negotiate specifications, contract price or terms, the potential for unfairly imposing a liability becomes great. Without the government contract defense a manufacturer capable of producing military goods for gov-

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<sup>39</sup> This may even understate the effect of imposing liability on government contractors so situated, because those contractors would presumably seek to insure against possible liability for the government's inadequacies and insurance companies do not spread the risk of loss without some financial benefit to themselves. If taken to the extreme, the government might ultimately find it less expensive to waive immunity under the circumstances, accept liability for injuries caused by its planning failures, and thereby avoid the expensive middleman.

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ernment use would face the untenable position of choosing between severe penalties for failing to supply products necessary to conduct a war, and producing what the government requires but at a contract price that makes no provision for the need to insure against potential liability for design flaws in the government's plans.

A recent New York State court decision, *Casabianca v. Casabianca*, 104 Misc. 2d 348, 428 N.Y.S.2d 400 (S. Ct. Bronx County 1980), recognized the problem of a manufacturer who provides products necessary to conduct a war under contract with the government. In *Casabianca* the court held that, as a matter of public policy, a manufacturer who supplies equipment to the United States Army in a time of war pursuant to government specifications may not be held liable for any inadequacy in the plans because

A supplier to the military in time of war has a right to rely on such specifications and is not obligated to withhold from the United States armed forces material believed by the latter to be necessary because the manufacturer considers the design to be imprudent or even dangerous. His conformance, under such circumstances, to the specifications provided to him should be, and is, a complete defense to any action based on design, whether faulty or not. *Casabianca v. Casabianca*, 104 Misc. 2d 348, 428 N.Y.S.2d 400, 401-402 (S. Ct. Bronx County 1980) (Stecher, J.).

Although some courts ignore or deny its existence,<sup>40</sup> the Supreme Court's recognition of the defense in *Yearsley v.*

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<sup>40</sup> See *Foster v. Day & Zimmerman, Inc.*, 502 F.2d 867, 873-74 (CA8 1974); *Whitaker v. Harvell-Kilgore Corp.*, 418 F.2d 1010, 1013-15 (CA5 1969).

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*W. A. Ross Construction Company* and the application of the defense in numerous other decisions certifies its continuing viability.<sup>41</sup>

## B. THE POSITIONS OF THE PARTIES

As defendants would apply the government contract defense here, plaintiffs' claims against the corporate defendants could not be actionable because the United States Government (1) invented Agent Orange, (2) experimented with herbicides for military use for over 20 years; (3) knew dioxin would be a byproduct of the manufacture of 2,4,5-T, an ingredient in Agent Orange; (4) knew the toxicity of dioxin as early as 1962; (5) compelled the defendants to manufacture Agent Orange using the mandatory provisions of the Defense Production Act, 50 U.S.C. App. § 2061 *et seq.*, and various economic and "informal" pressures to coerce defendants; (6) refused to allow defendants to produce phenoxy herbicides for their civilian markets; (7) unilaterally determined the terms and specifications of the contracts under which the defendants manufactured Agent Orange, including complete control over the chemical composition, volume, weight, purity, acidity, appearance, quality, inspection, testing procedures, packaging, marking and method of shipment used; (8) visited defendants' plants regularly to conduct inspections and tests to ensure the defendants' compliance with the contract terms; (9) assured the availability to defendants of the raw materials needed to produce Agent Orange on a high priority basis; (10) unilaterally determined the nature and extent of the

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<sup>41</sup> See e.g., *A. J. Myers v. United States*, 323 F.2d 580, 583 (CA9 1963); *Merritt, Chapman & Scott Corp. v. Guy F. Atkinson Company*, 295 F.2d 14, 16 (CA9 1961).

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use in southeast Asia of the Agent Orange produced, with concentrations of component herbicides far in excess of any commercially manufactured product; and (11) exercised exclusive control over the use of Agent Orange in southeast Asia.

Defendants argue (1) that they merely manufactured and supplied Agent Orange to the government pursuant to validly authorized contracts, (2) that Agent Orange was not manufactured before and has not been manufactured since; (3) that they completed their compelled manufacture of Agent Orange in strict compliance with the specifications supplied by the government, specifications that contained no obvious or "glaring" defects that would have alerted the defendants of any impending danger in following them; and (4) that they manufactured Agent Orange without any negligence on their part.

In short, the defendants claim to have served their country's military needs without any shortcomings in their performance. They contend that but for the government's decision to use Agent Orange in southeast Asia the defendants would not have manufactured Agent Orange and the harm claimed to have been caused by the herbicide would never have occurred. Defendants further note that they were in no position to question the government's military judgment to use the herbicide as a tactical weapon during the Vietnam war, and had no choice under federal law but to comply with the government's order to produce Agent Orange.

Thus, defendants argue that they were merely agents of the government acting under the compulsion of federal law in patriotic furtherance of the Vietnam war effort. They claim to have produced an effective product that met, in every respect, the government's detailed specifications and expectations. Defendants argue that well established legal

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principles, sound social policy, and general principles of fairness dictate that they not be held liable for injuries resulting solely from their strict compliance with government contracts for war related products that performed exactly as expected in their military uses.

Plaintiffs argue (1) that defendants should not be permitted to "hide" behind government specifications to avoid liability, and (2) that summary judgment is inappropriate because the defendants "bald assertion that the [government] specifications were, in fact, complied with" cannot be accepted by the court as true without a trial to determine whether defendants' allegations with respect to the government contract defense are factually correct.

### C. SUMMARY JUDGMENT DENIED

The standards for consideration of a motion for summary judgment pursuant to F.R.C.P. 56 are well established and need not be repeated here except to note that on a motion for summary judgment the court "cannot try issues of fact; it can only determine whether there are issues to be tried", *American Manufacturers Mutual Insurance Company v. American Broadcasting-Paramount Theatres, Inc.*, 388 F.2d 272, 279 (CA2 1967), *cert. denied*, 404 U.S. 1063, 92 S. Ct. 737, 30 L. Ed. 2d 752 (1972) and the court "must resolve any doubts in favor of the party opposing the summary judgment motion". *SEC v. Research Automation Corp.*, 585 F.2d 31 (CA2 1978).

Having considered all the authorities cited and the arguments of counsel, the court is satisfied that a government contract defense exists and has possible application to the facts at bar. Plaintiffs are correct, however, to the extent that they argue the presence of fact issues which preclude summary judgment since any application of the government



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contract defense in this context will require that defendants prove that their relationship with the government and performance under the government contract was essentially as they describe it. In short, whatever the minimum showing necessary to support a finding for defendants on the government contract defense may be, allegations with respect to their contract performance and relationship with the government present issues of fact requiring trial.

Resolution of the fact issues by separate trial will determine whether defendants have a complete defense to the claims asserted against them. This is the reason the court has chosen the government contract defense for the Phase I trial as discussed in section III above. The elements of the defense will be uniquely adapted to consideration and adjudication, separate and apart from the issues of liability, causation and damages. As a practical matter, discovery as to these discrete issues will be rather narrow compared to the discovery that some of the other fact issues presented by this action may require.

Although satisfied that the government contract defense exists and has possible application here, however, the court is not satisfied that the parties have sufficiently focused their attention on the precise standards applicable and the specific facts defendants need to prove to make out the defense under the circumstances of this action.<sup>42</sup> Accordingly, the

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<sup>42</sup> For example, some courts view the government contract defense as coupling the government's sovereign immunity with the contractor's obligation to follow the government's directions, *see Green v. ICI America, Inc.*, 362 F. Supp. 1263, 1265 (E.D. Tenn. 1973). It may well be that the sovereign's immunity from suit is not an essential element of the defense. *See Dolphin Gardens, Inc. v. United States*, 243 F. Supp. 824, 827 (D. Conn. 1965); *A. J. Myers v. United States*, 323 F.2d 580, 583 (CA9 1963). Similarly, other courts frame

(footnote continued on following page)



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parties are to prepare (1) briefs focusing on this issue, and (2) proposed special verdicts to be presented to the jury in the Phase I trial. Of course, the proposed special verdicts will not be binding at this stage; rather, they are to assist counsel and the court in focusing upon the issues that require discovery and trial in Phase I. These items are to be served and filed by January 23, 1981. The court will hear argument on the standards and elements of the government contract defense as applied to this case and will discuss the proposed special verdicts at the pretrial conference to be held January 30, 1981 at 9:00 a.m.

As noted above, the court believes that early resolution of this potentially dispositive issue will serve the interests of justice and judicial efficiency. Although justice is always served by the efficient management of any action, this is especially true in this case where any other procedure adopted might subject the parties to years of discovery and trial only to have later generations of judges, lawyers, and litigants discover that an early trial of the government contract defense might have preempted the need for almost all of the discovery undertaken and saved thousands of person-hours and millions of dollars associated with those unnecessary efforts. The parties here are entitled to have this action handled as efficiently and expeditiously as possible and, in the court's considered view, the approach here out-

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*(footnote continued from preceding page)*

the elements of the defense in terms of military necessity. See *Casabianca v. Casabianca*, 104 Misc. 2d 348, 428 N.Y.S.2d 400, 401-402 (S. Ct. Bronx County 1980) (Stecher, J.). Whether these elements are essential to the successful assertion of the government contract defense, however, need not be determined because the court has determined that the sovereign is immune under the circumstances here presented, see *discussion* Section II *supra*, and it is beyond dispute that the Agent Orange produced by defendants here was manufactured in time of war.

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lined balances the numerous interests in a way that will best serve those goals.

## VI. DISCOVERY

Under the case management plan set forth in section III of this pretrial order, it is appropriate for discovery to proceed now as efficiently and expeditiously as possible on all Phase I issues. Most of the material necessary to support the defendants' government contract defense is in defendants' own control. Plaintiffs have continually urged an early trial, and lead counsel has repeatedly represented to the court that depositions of a limited number of Dow employees are the only discovery necessary before proceeding to trial. Although the government is no longer a party to this action, the Department of Justice has promised the court cooperation with all parties in facilitating full and complete discovery of all material within the government's control.

To date, very little discovery has taken place. By practice and procedure order dated May 18, 1979, this court stayed all discovery proceedings until further court order; by order dated February 5, 1980, this stay was modified to allow the parties to "conduct voluntary discovery by agreement among themselves". In addition to whatever voluntary discovery has taken place, the court on specific motions has permitted the depositions of certain plaintiffs with a "high risk of unavailability for trial" to be taken. *E.g., Hartz v. Dow Chemical Company*, 79 C 2752 (EDNY GCP) (memorandum and order of January 18, 1980).

The first wave of Phase I discovery is to commence immediately, and the stay is vacated, but only for this purpose. The first wave of discovery as defined in § 1.50 of the Manual for Complex Litigation, is designed to disclose all preliminary matters necessary before proceeding to discovery on the merits, specifically:

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(1) the names and location of witnesses whose written interrogatories or depositions upon oral interrogatories may be sought on the merits; (2) the existence, location and custodian of documents and other physical evidence, the production of which may be sought on the merits; and (3) information concerning the transactions upon which the claims for relief are based.

The parties are directed to serve and file first wave interrogatories by January 15, 1981. Any objections to these interrogatories shall be served and filed on or before January 23, 1981. Defendants shall confer and submit joint interrogatories and objections. Failure to timely object will operate as a waiver of any and all objections. The objections will be discussed and ruled on at the conference scheduled for January 30, 1981. The court does not anticipate frivolous objections to any interrogatories, but any objections made without a good faith basis will be summarily denied as well as subject their proponent to sanctions. The answers to all first wave interrogatories are to be served and filed by February 13, 1981.

The court has previously received and reviewed several suggestions for orderly discovery advanced by the parties. However, those proposals were made without the benefit of the court's case management plan. Counsel are to submit memoranda outlining their thoughts and proposals for the remainder of Phase I discovery by January 23, 1981. Proposals should focus on the scope and type of material to be discovered, as well as the sequence and timing that discovery should take. Those proposals should have as their goal the expeditious, free and open exchange of information contemplated by the Federal Rules of Civil Procedure and required by this court in all cases before it. At the January

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30, 1981 conference the court will hear argument about the various proposals and soon thereafter will establish a comprehensive discovery and trial schedule to govern the remainder of Phase I.

## VII. STATUTES OF LIMITATIONS

In light of the Second Circuit's decision that federal question jurisdiction is inappropriate in the context of this action, *In re Agent Orange*, 2 Cir., 635 F.2d 987 (1980), diversity jurisdiction under 28 U.S.C. § 1332 may provide the sole basis for subject matter jurisdiction. Since federal courts sitting in diversity apply state law on questions involving the statute of limitations, *Guarantee Trust Company of New York v. York*, 326 U.S. 99, 109, 65 S. Ct. 1464, 1469, 89 L. Ed. 2079 (1945), and since this action will ultimately involve the statute of limitations of most, if not all, of the states, counsel shall submit briefs setting forth the applicable law of each state on the subject. Even if the pending petition for rehearing before the Second Circuit en banc is granted and federal question jurisdiction is ultimately determined to be a valid ground for subject matter jurisdiction, this survey would be helpful, even necessary, in determining what the federal common law is or should be. The briefs shall be served and filed by January 30, 1981, and reply briefs, if necessary, shall be served and filed by February 6, 1981.

## VII. CONCLUSIONS

### *Government's Motion to Dismiss:*

The government's motion to dismiss is granted, and the third party complaints against the government deemed to have been made in all actions under MDL 381 are dismissed.

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*Case Management Plan:*

The case will be tried in "phases" and in accordance with the procedures and principles outlined above in the section of this order entitled "The Case Management Plan".

*Plaintiffs' Motion for "Serial Trials":*

Plaintiffs' motion for serial trials is denied except insofar as the case management plan adopted by the court incorporates the suggestion to use "phased" trials. The denial of the motion is without prejudice to renewal at some future date when the court may seek additional input as to the future course of this litigation.

*Plaintiffs' Motion to Amend the Complaint:*

Plaintiffs' motion to amend the complaint by adding the United States government and many of its officials on a theory of constitutional tort is denied without prejudice to the commencement of a separate action.

*Class Action:*

Plaintiffs' motion for class action certification is granted to the extent of conditional class action certification pursuant to F.R.C.P. 23(b)(3). In all other respects the motion is denied. In addition:

By January 23, 1981 counsel are to submit their suggestions as to how "the best notice available" may be given to the members of plaintiff class.

By January 7, 1981 counsel for plaintiffs shall serve and file a proposed form of notice. Counsel for defendants shall meet by January 16, 1981 to discuss and, if possible, agree upon suggested modifications to the proposed notice. Defendants' suggested modi-

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fications, if any, shall be served and filed by January 23, 1981.

By January 16, 1981 counsel for plaintiffs shall submit a list of no more than 12 persons as proposed class representatives. By January 23, 1981 defendants shall serve and file any suggestions, objections or comments they have with respect to the proposed representative plaintiffs. At the January 30, 1981 conference the court will determine who the named plaintiffs will be.

*Defendants' Motion for Summary Judgment:*

Defendants' motion for summary judgment is denied because the defendants' assertion of the government contract defense presents fact issues requiring trial. In addition:

By January 23, 1981 the parties are to serve and file (1) briefs focusing on the precise standards applicable and the specific facts defendants need to prove in order to successfully establish the government contract defense, and (2) proposed special verdicts to be presented to the jury in the Phase I trial. The court will hear argument on the standards and elements of the government contract defense as applied to this case and will discuss the proposed special verdicts at the pretrial conference to be held January 30, 1981.

*Discovery:*

The stay of discovery previously imposed is vacated to the extent that the parties are to engage in first wave discovery of Phase I issues. In addition:

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The parties are to serve and file first wave interrogatories by January 15, 1981. Any objections to these interrogatories shall be served and filed on or before January 23, 1981. Defendants are to confer and submit joint interrogatories and objections. Failure to file timely objections will operate as a waiver of any and all objections. The objections will be discussed and ruled upon at the January 30, 1981 conference. The answers to all first wave interrogatories are to be served and filed by February 13, 1981.

Counsel are to submit memoranda outlining their thoughts and proposals regarding a comprehensive plan and timetable for Phase I discovery by January 23, 1981. The court will hear argument about the various proposals for Phase I discovery at the January 30, 1981 conference.

*Statutes of Limitations:*

Counsel shall serve and file briefs setting forth the applicable law relating to the statutes of limitations of every state by January 30, 1981. Reply briefs, if necessary, shall be served and filed by February 6, 1981.

*Next Conference:*

The next pretrial conference will be held before the undersigned at the Long Island Courthouse on January 30, 1981 at 9:00 a.m. Any party wishing to propose additions to the agenda should do so by letter to the court received no later than January 27, 1981.

**SO ORDERED.**

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Dated November 24, 1980**

**UNITED STATES COURT OF APPEALS**

**FOR THE SECOND CIRCUIT**

**No. 1069, Docket 80-7079**

**IN RE "AGENT ORANGE" PRODUCT LIABILITY LITIGATION**

**Argued May 1, 1980**

**Decided Nov. 24, 1980**

**Before FEINBERG, Chief Judge, and VAN GRAAFEILAND  
and KEARSE, Circuit Judges.**

**KEARSE, *Circuit Judge*:**

This appeal presents the question whether claims asserted by veterans of the United States armed forces against companies which supplied the United States government with chemicals that are alleged to have been contaminated and to have injured the veterans and their families, are governed by federal common law. Defendants-appellants Diamond Shamrock Corporation, Monsanto Company, Thompson-Hayward Chemical Company, Hercules Incorporated and the Dow Chemical Company were the manufacturers of various herbicides including "Agent Orange" (hereinafter collectively referred to as "Agent Orange") for use by the military as defoliants in the Vietnam War. The plaintiffs, veterans of that war and their families, allege that they have sustained various physical injuries by reason of the veterans' exposure to Agent Orange. Plaintiffs seek redress of those injuries under federal common law, and have invoked the "federal question" jurisdiction of the district court. 28 U.S.C. § 1331(a) (1976). Defendants contest the existence of a federal common law cause of action, and



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moved below to dismiss for lack of subject matter jurisdiction. The United States District Court for the Eastern District of New York, George C. Pratt, Judge, denied their motion. Defendants obtained certification of the jurisdiction issue and took this appeal pursuant to 28 U.S.C. § 1292(b) (1976).<sup>1</sup>

We agree with defendants that there is no federal common law right of action under the circumstances of this litigation. Accordingly, we reverse.

# I

The present litigation began in late 1978 and early 1979, when several individual veterans and their families commenced actions in the Northern District of Illinois and the Southern and Eastern Districts of New York, claiming injury from the veterans' exposure to Agent Orange and purporting to represent several classes of injured persons and persons allegedly "at risk" of injury. The plaintiffs in most of these actions were represented by the same attorney, who filed substantially identical complaints in all actions, naming the same defendant manufacturers. By order of the Judicial Panel on Multidistrict Litigation, thirteen such actions, involving thirty named plaintiffs, were transferred to the Eastern District of New York and assigned to Judge Pratt for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407 (1976). Subsequently, additional actions were filed and were transferred to the Eastern District. It appears that there are presently more than 800 named plaintiffs in these proceedings.

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<sup>1</sup> This Court granted defendants' motion for leave to appeal by order dated January 16, 1980.

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After the transfer plaintiffs filed an amended complaint in the action that the district court had designated as the lead action for purposes of pretrial proceedings. Defendants moved to dismiss on various grounds, and by opinion dated August 14, 1979, the district court dismissed a number of claims<sup>2</sup> and directed that a new complaint be filed. The second amended complaint was filed on August 20, 1979, asserting causes of action under the federal common law<sup>3</sup> and premising subject matter jurisdiction on 28 U.S.C. § 1331(a).<sup>4</sup> Defendants moved to dismiss for lack of subject matter jurisdiction. The motion was argued on October 3, 1979, and after argument but prior to decision plaintiffs proffered a third amended complaint. Defendants consented to the filing of the new complaint, and the district court, at the urging of the defendants, treated defendants' motion to dismiss as having been made with respect to that

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<sup>2</sup> These included a claim for injunctive relief against further manufacture of certain herbicides (which, the district court concluded, lay within the primary jurisdiction of the Environmental Protection Agency), as well as claims asserted under 42 U.S.C. § 1983 (1976) and various provisions of the antitrust and trademark laws.

<sup>3</sup> Plaintiffs also sought to assert a cause of action under the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 135 *et seq.* (1970) ("FIFRA"). The district court declined to infer such a cause of action for reasons we believe to be correct. See note 9 *infra*.

<sup>4</sup> 28 U.S.C. § 1331(a) provides in part as follows:

The district court shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interests and costs, and arises under the Constitution, laws, or treaties of the United States . . . .

A cause of action which is founded on federal common law "arises under" the laws of the United States within the meaning of § 1331(a). *Illinois v. City of Milwaukee*, 406 U.S. 91, 99-100, 92 S. Ct. 1385, 1390-91, 31 L. Ed. 2d 712 (1972); *Ivy Broadcasting Co. v. American Tel. & Tel. Co.*, 391 F.2d 486, 492 (2d Cir. 1968).

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complaint. Accordingly, it is the third amended complaint (hereinafter sometimes referred to as the "Complaint") that is before us on this appeal.

*A. The Third Amended Complaint*

The basic thrust of the Complaint is relatively simple: defendants manufactured a "phenoxy herbicide," Agent Orange, for use by the military in Vietnam. The herbicide was allegedly contaminated with certain toxic organic chemicals, including 2,3,7,8-tetrachlorodibenzo-p-dioxin ("dioxin"), which plaintiffs describe as "one of the most toxic substances ever developed by man." (Plaintiffs' Brief on Appeal at 2.) The plaintiff veterans assert that they were exposed to Agent Orange, and thus to the dioxin it contained while serving in Vietnam. They claim to have sustained various physical injuries, or to be "at risk" of such injuries, by reason of that exposure. Plaintiffs seek relief on a number of theories, including strict product liability, negligence, and breach of warranty.

What marks these proceedings as somewhat extraordinary are the size of the plaintiff class and the scope of the relief that is sought. Plaintiffs purport to represent the 2.4 million veterans who served as combat soldiers in Southeast Asia from 1962 through 1971, as well as most of the families or survivors of those veterans. Fifteen plaintiff subclasses are identified; many of these subclasses consist of persons who are "at risk" of, but have yet to sustain, various physical injuries. Plaintiffs have alleged that "the combined liquid assets of the 'corporate defendants' will be insufficient to fully compensate the entire class of plaintiffs." (Complaint ¶ 15.) Plaintiffs therefore seek, in addition to un-

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specified damages,<sup>5</sup> a decree requiring defendants, upon a determination of liability, to establish

a trust fund out of the current earnings of the defendants in the nature of a reserve against the claims of all the individual members of the plaintiff class to insure that the compensation of any group of individual plaintiffs will not impair the rights of those not before the Court at that time.

(Complaint ¶ 9.) Plaintiffs also seek a permanent injunction against further manufacture of Agent Orange.

Defendants deny that there is any causal connection between exposure to Agent Orange and the injuries that plaintiffs claim to have sustained, and vigorously contest the propriety of the various remedial measures that plaintiffs seek to impose on them. This case, however, is still at the pleading stage, and for purposes of deciding the jurisdictional question before us, plaintiffs' factual allegations must be accepted as true.

*B. The Decision of the District Court*

Plaintiffs argue that federal common law should be applied to their claims principally because of the unique federal nature of the relationship between the soldier and his government, relying chiefly on *United States v. Standard Oil Co.*, 332 U.S. 301, 305, 67 S. Ct. 1604, 1606, 91 L. Ed. 2067 (1947) ("Perhaps no relation between the Government and a citizen is more distinctively federal in character than that between it and members of its armed forces."). They contend that this interest brings the case within the

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<sup>5</sup> The third amended complaint alleges no specific *ad damnum*. The second amended complaint, however, asserted damages "in the range of \$4 billion to \$40 billion."

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doctrine of *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366, 63 S. Ct. 573, 574, 87 L. Ed. 838 (1943), which held that, in order to ensure uniformity and certainty, "[t]he rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law." Plaintiffs argue that the government similarly has an interest in having all of its veterans compensated by government contractors who manufactured or marketed Agent Orange, and that application of the respective state laws would impede recovery on a uniform basis.

The district court rejected the contention that *Clearfield Trust* stated the controlling principle, recognizing that the United States, a party to *Clearfield Trust*, is not party to the plaintiffs' claims here.<sup>6</sup> Rather, the court recognized that since the present action involves only private parties, the federal common law issue is controlled by the principles set forth in *Miree v. DeKalb County*, 433 U.S. 25, 97 S. Ct. 2490, 53 L. Ed. 2d 557 (1977), and *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 86 S. Ct. 1301, 16 L. Ed. 2d 369 (1966). After reviewing the latter decisions, the district court applied a three-factor test to determine whether federal common law governs plaintiffs' claims:

- (1) the existence of a substantial federal interest in the outcome of a litigation; (2) the effect on this federal interest should state law be applied; and
- (3) the effect on state interests should state law be displaced by federal common law.

Slip op. at 17.

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<sup>6</sup> We note that the defendants have impleaded the United States in the present action. It is clear, however, that the jurisdiction of the district court over the claims of the plaintiffs is not enhanced by third party complaints. Cf. *Louisville & Nashville RR. Co. v. Mottley*, 211 U.S. 149, 29 S. Ct. 42, 53 L. Ed. 126 (1908).

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With respect to the first factor, the district court recognized two principal federal interests that may be affected by the present lawsuits: the federal government's interest in its relations with members of the armed forces, and its interest in its relations with suppliers of war materiel. As to the government's interest in the welfare of its veterans, the court stated that:

Soldiers serving in the armed forces are government charges, entitled to government protection. Torts committed by war contractors against soldiers in action constitute "harms inflicted" on the soldiers and "interference" with the relationship between soldiers and the government. Such harms and interferences implicate federal interests identified in [*United States v. Standard Oil, supra*].

*Id.* at 18. The court rejected defendants' contention that these interests were already protected by the Congressionally-enacted scheme of veterans' benefits, 38 U.S.C. § 310 *et seq.* (1976),<sup>7</sup> opining that

[t]he limited nature of compensation provided by 38 U.S.C. § 310 *et seq.* makes it an insufficient guardian of the rights at stake in this litigation, viz. the rights of soldiers to be protected from "harms inflicted by others" and to be compensated for harms already inflicted. The existence and extent of these contested rights necessarily are intertwined

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<sup>7</sup> 38 U.S.C. § 310 *et seq.*, entitled "Compensation for Service-Connected Disability or Death," establishes for veterans a basic entitlement to compensation from the government for injuries resulting from military service, and sets rates of compensation for specific types and degrees of disability. These provisions do not address issues of the liability of third parties to injured service personnel.

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with the relationship between government and soldier and thereby implicate federal interests.

Slip op. at 18-19. Finally, the court reasoned that because of the large number of veterans claiming injury, and the large potential liability of the five defendants, the foregoing federal interests were "substantial" for purposes of the federal common law analysis:

The estimated number of involved veterans ranges from thousands to millions, and the estimated potential liability of the five war contractors ranges from millions to billions of dollars. As the number of veterans and the size of the claims against the war contractors increase so the federal interest in this litigation expands.

*Id.* at 20.

As to the government's interest in its relations with its military suppliers—the court referred to a number of "speculative" ways in which lawsuits such as the present ones might adversely affect that interest, pointing out that in response to any increase in their potential liability, military suppliers might raise their prices, attach conditions to the use of their products, or stop dealing with the government altogether.<sup>8</sup> The court concluded that

government relations with war contractors might well be drastically altered by changes in the rules governing liability of war contractors to soldiers for injuries caused by inherently "dangerous" war materials.

*Id.* at 19-20.

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<sup>8</sup> The court also noted that if defendants are eventually held liable for massive damages awards, the resulting blow to their financial health could have serious repercussions in the national economy.

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Turning to the second part of its test, the court found that the federal interest it had identified would be adversely affected if the issues in these lawsuits were adjudicated under state law:

Application of varying state laws would burden federal interests by creating uncertainty as to the rights of both veterans and war contractors. It would also be unfair in that essentially similar claims, involving veterans and war contractors identically situated in all relevant respects, would be treated differently under different state laws.

*Id.* at 21.

Finally, as to the third part of its test, the court determined that application of federal common law would not have any significant adverse impact on state interests. While noting that "[t]ort claims are traditionally matters for state law, which has developed comprehensive substantive and procedural rules to govern them," *id.* at 22, the court distinguished the instant tort actions, finding that

state law has not considered the complex question of a war contractor's liability to soldiers injured by toxic chemicals subject to federal regulation while engaged in combat and serving abroad.

*Id.* at 23. The court concluded:

Because state law is no more or less developed as to such claims than federal common law, application of federal common law thereto would not significantly displace state law.

*Id.*

Having found substantial federal interests that would be adversely affected by application of state law to the instant



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claims, and having determined that there were no substantial state interests in having state law applied, the district court ruled that plaintiffs had stated valid causes of action under the federal common law.<sup>9</sup> The court therefore held

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<sup>9</sup> The district court correctly determined that there is no private right of action under FIFRA, 7 U.S.C. § 135 *et seq.* (1970). The current statute is the result of two principal enactments: the original FIFRA, Pub. L. No. 80-104, 61 Stat. 163 (1947) (codified at 7 U.S.C. §§ 135-135K (1976)), and the Federal Environmental Pesticide Control Act ("1972 Act"), Pub. L. No. 92-516, 86 Stat. 973 (1972) (codified at 7 U.S.C. §§ 136-136y (1976)), which amended, and has now superseded, the original Act. See Pub. L. No. 92-516, § 4(b), 86 Stat. 998 (1972). Following the four-pronged analysis set forth in *Cort v. Ash*, 422 U.S. 66, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975), we conclude that neither enactment gives rise to a private right of action.

The four factors to be considered under *Cort v. Ash* are (1) whether the plaintiff is "one of the class for whose *especial* benefit the statute was enacted," (2) whether there is "any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one," (3) whether a right of action would be "consistent with the underlying purposes of the legislative scheme," and (4) whether the cause of action is "one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law." *Id.* at 78, 95 S. Ct. at 2087.

As to the original FIFRA, which was in effect during the entire period that plaintiff veterans served in Vietnam, we see no essential satisfaction of any of the *Cort v. Ash* tests. First, there is no indication that the bill was enacted for the *especial* benefit of military men. It is clear that Congress's intent was to protect the public in general, with perhaps some special consideration for "agricultural producers and other users" of pesticides and rodenticides. See [1947] U.S. Code Cong. Serv. pp. 1200, 1202 (quoting the Report of the House of Representatives Committee on Agriculture). FIFRA makes no special mention of soldiers; and the House report, which states that the bill was considered by the United States Departments of Agriculture and the Interior, does not indicate that the bill was considered by any military or defense agency. *Id.* As to the second (and most important, see *Leist v. Simplot*, 638 F.2d 283 (2d Cir. 1980)) of the *Cort* factors, we see no clear indication of legislative intent to create a private remedy. Plaintiffs have cited no legislative history on this

(footnote continued on following page)

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that it had subject matter jurisdiction over the case, and denied defendants' motion to dismiss.<sup>10</sup> This appeal followed.

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(footnote continued from preceding page)

point, nor have they presented any detailed statutory analysis. The Act itself is primarily concerned with establishing an administrative scheme of labeling, registration and enforcement; there are indications that Congress expected that scheme to be the exclusive means of enforcement. See [1947] U.S. Code Cong. Serv. *supra*, at 1202. We conclude that this factor cuts against the plaintiffs. The third *Cort* factor is of little assistance here. While a private right of action might enhance enforcement of the Act's substantive provisions to some extent, it would also increase the burden on manufacturers (without commensurately increasing protection of injured persons who can recover damages under the state product liability law), something which the administrative scheme of registration was specifically intended to avoid. See [1947] U.S. Code Cong. Serv., *supra* at 1202. Finally, the fourth *Cort* factor cuts strongly against the plaintiffs. The area of product liability has been "traditionally relegated to state law," and this is no less true of the products regulated by the FIFRA. See, e.g., *Muncy v. Magnolia Chemical Co.*, 437 S.W.2d 15 (Tex. Civ. App. 1968). Thus, we conclude that the district court was correct in ruling that there is no private right of action under the original FIFRA.

As to the 1972 Act, the unavailability of a private right of action is even clearer. We find no more positive indications in the first, third and fourth *Cort* factors. More importantly, we find a negative indication as to the second *Cort* factor, i.e., legislative intent, since Congress considered and explicitly rejected amendments that would have authorized citizen suits to enforce the 1972 Act's prohibitions. See *People for Environmental Progress v. Leisz*, 373 F. Supp. 589, 592 (C.D. Cal. 1974) (discussing legislative history); see also *Kelly v. Butz*, 404 F. Supp. 925, 940 (W. D. Mich. 1975). It is not for us to override that Congressional determination.

<sup>10</sup> The court also denied defendants' motion to strike portions of the Complaint relating to plaintiffs' demand that defendants be required to establish a trust fund. The court premised the denial on its conclusion that

defendants are not prejudiced by allowing these requests for relief to remain in the [Complaint], since defendants have no obligation to admit or deny plaintiffs' requests for relief, which therefore place no pleading burden on defendants.

(footnote continued on following page)

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## II

Both plaintiffs and defendants accept the three-part test that the district court applied to the federal common law issue, and for purposes of discussion we accept that framework. But, focusing our consideration chiefly on the first factor of the test, *i.e.*, "the existence of a substantial federal interest in the outcome of the litigation," we disagree with the district court's analysis and conclude that the court gave insufficient weight to the Supreme Court's repeated admonition that

[i]n deciding whether rules of federal common law should be fashioned, normally the guiding principle is that a *significant conflict between some federal*

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*(footnote continued from preceding page)*

at 24. In addition, it appears that the court declined to rule on a motion to strike portions of the Complaint relating to class members who have not yet been injured, but are said to be merely "at risk" of injury by reason of a veteran's exposure to Agent Orange. Defendants argue here, as they have in moving for reargument below, that the district court should have granted both motions to strike. We decline to reach these questions. The district court, in granting certification under § 1292(b) was primarily concerned with the question of subject matter jurisdiction; the certification mentions only that issue. While we are not restricted by the district court's limited certification, *see Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 994-95 (2d Cir.), *cert. denied*, 423 U.S. 1018, 96 S. Ct. 453, 46 L. Ed. 2d 389 (1975), and may review the entire order of the court below. *Capital Temporaries, Inc. v. Olsten Corp.*, 506 F.2d 658, 660 (2d Cir. 1974), we conclude that review now of the trust fund and "at risk" issues would be inappropriate. First, our ruling on subject matter jurisdiction may end the federal court litigation. (It is unclear whether any plaintiffs will seek to proceed on the basis of diversity jurisdiction.) More importantly, the district judge did not assess the merits of either motion to strike, and we note that he has reserved decision on defendants' motion for reargument of these questions, pending decision of this Court on the question of jurisdiction. In all, we think the wiser course is for this Court not to pass on them at this time.

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*policy or interest and the use of state law in the premises must first be specifically shown . . . .*

*Wallis v. Pan American Petroleum Corp.*, *supra*, 384 U.S. at 68, 86 S. Ct. at 1304, *quoted with emphasis in Miree v. DeKalb County*, *supra*, 433 U.S. at 31, 97 S. Ct. at 2494. Principally we reject the district court's conclusion that there is an indefinite federal policy at stake in this litigation that warrants the creation of federal common law rules.<sup>11</sup>

In considering plaintiffs' contentions, it is essential to delineate precisely the relation of the United States to the claims here at issue. These claims are brought by former servicemen and their families against private manufacturers; they are not asserted by or against the United States, and they do not directly implicate the rights and duties of the United States. They are thus unlike the claims in *United States v. Standard Oil Co.*, *supra*, in which the government brought suit to recover for its payments to a soldier injured as a result of the defendant's negligence, and *Clearfield Trust Co. v. United States*, *supra*, in which the government brought suit to enforce its rights in commercial paper issued by it. In each of those cases the government was a party seeking to enforce its own asserted rights, and analysis reveals two federal concerns which are inherent in such cases. First, the government has an interest in having uniform rules govern its rights and obligations. Second, the government has a substantive interest in the contents of those uniform rules. The first interest prizes uniformity for its own sake and is content-neutral; it does not dictate the substance of

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<sup>11</sup> Since we conclude that there is not now an identifiable federal policy, we need not reach the second and third factors of the test and speculate as to how state law, if it were already developed, would affect the federal policy if it were identifiable—or vice versa.

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the federal common law rule to be applied. Thus, in *United States v. Standard Oil Co.*, *supra*, the Court applied federal common law, recognizing the government's interest in uniformity, but refused to impose the liability argued for by the United States as the substance of that law.

The present litigation is fundamentally different from *Standard Oil and Clearfield Trust* with respect to both uniformity interest and substantive interest in the content of the rules to be applied. Since this litigation is between private parties and no substantial rights or duties of the government hinge on its outcome, there is no federal interest in uniformity for its own sake.<sup>12</sup> See e.g., *Miree v. DeKalb County*, *supra*, 433 U.S. at 28, 97 S. Ct. at 2493. The fact that application of state law may produce a variety of results is of no moment. It is in the nature of a federal system that different states will apply different rules of law, based on their individual perceptions of what is in the best interests of their citizens. That alone is not grounds in private litigation for judicially creating an overriding federal law. Indeed, even where a federal statutory program governs the rights of private litigants and Congress has left gaps to be filled by the courts, uniformity is not prized for its own sake. For example, in *Auto Workers v. Hoosier Corp.*, 383 U.S. 696, 701-05, 86 S. Ct. 1107, 1110-1113, 16 L. Ed. 2d 192 (1966), the Court dealt with a suit under § 301 of the National Labor Relations Act, 29 U.S.C. § 185 (1976), to which federal common law applied. Yet in determining the

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<sup>12</sup> Compare *Bank of America Nat'l Trust & Sav. Ass'n v. Parnell*, 352 U.S. 29, 32-34, 77 S. Ct. 119, 120-121, 1 L. Ed. 2d 93 (1956), private litigation involving the issues of whether certain government bonds were "overdue" and whether the defendant had taken title to the bonds in good faith. The Court observed that the question of whether a government bond is overdue is a matter of federal law, but held that questions as to a party's good faith are left to local law.

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timeliness of such suits, the Court ruled that the appropriate state statutes of limitations should apply, and refused to impose a uniform federal period of limitations:

[T]imeliness . . . is clearly a federal question, for in § 301 suits the applicable law is "federal law, which the courts must fashion from the policy of our national labor laws." *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456, 77 S. Ct. 912, 917, 1 L. Ed. 2d 972. . . . We are urged instead [of referring to state laws,] to devise a uniform time limitation to close the statutory gap left by Congress. But the teaching of our cases does not require so bald a form of judicial innovation.

383 U.S. at 701, 86 S. Ct. at 1110. Thus, the prospect of uniformity is insufficient reason to invoke federal common law in private litigation; and if federal common law were invoked, it would not ensure uniformity since frequently that law takes its substance from local law.

The second fundamental difference between the present litigation and the *Clearfield Trust* type of case is that in the latter, the government's substantive interest in the litigation is essentially monothetic, in that it is concerned only with preserving the federal fisc, whereas here the government has two interests; and here the two interests have been placed in sharp contrast with one another. Thus, the government has an interest in the welfare of its veterans; they have given of themselves in the most fundamental way possible in the national interest. But the government also has an interest in the suppliers of its materiel; imposition, for example, of strict liability as contended for by plaintiffs would affect the government's ability to procure materiel without the exaction of significantly higher prices, or the attachment of

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onerous conditions, or the demand of indemnification or the like. As plaintiffs' counsel has observed, "this litigation will have a direct and lasting impact on the relationship between the federal government and war contractors . . . and between the federal government and veterans." (Letter dated October 21, 1980, V. J. Yannacone, Jr. to A. D. Fusaro.) It is obvious that the government is interested. But unlike a simple uniformity interest, neither the government's interest in its veterans nor its interest in its suppliers is content-neutral. Each interest will be furthered only if the federal rule of law to be applied favors that particular group.

The extent to which either group *should* be favored, and its welfare deemed "paramount" (see dissent of Chief Judge Feinberg, *post*), is preeminently a policy determination of the sort reserved in the first instance for Congress. The welfare of veterans and that of military suppliers are clearly federal concerns which Congress should appropriately consider in setting policy for the governance of the nation, and it is properly left to Congress in the first instance to strike the balance between the conflicting interests of the veterans and the contractors, and thereby identify federal policy. Although Congress has turned its attention to the Agent Orange problem,<sup>13</sup> it has not determined what the federal policy is with respect to the reconciliation of these two competing interests. Thus, this case is unlike *Owens v. Haas*, 601 F.2d 1242 (2d Cir.), *cert. denied*, 444 U.S. 980, 100 S. Ct. 483, 62 L. Ed. 2d 407 (1979), or *Ivy Broad-*

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<sup>13</sup> Congress has directed the Administrator of Veterans' Affairs to design and conduct an epidemiological study of veterans who were exposed to Agent Orange, and to report periodically to Congress until the study is completed. See Pub. L. No. 96-151, 96th Cong., 1st Sess. (1979); 38 U.S.C. § 219 note (Supp. 1980).



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casting *Co v. American Tel. & Tel. Co.*, 391 F.2d 486 (2d Cir. 1968), in which the court was asked to supplement with federal common law a federal statutory program which itself embodied Congressional policy determinations.<sup>14</sup> In *Owens*, as Chief Judge Feinberg observes, *post*, the Court "discerned a 'federal regulatory scheme'" for the protection of prisoners. It is one thing to *discern* a federal regulatory scheme from the statutes Congress has enacted, as in *Owens*; it is another to *devise* such a scheme in the face of inaction by Congress. The dissent finds it anomalous that federal common law may apply to prisoners but not to veterans. We suggest that the anomaly lies not with the court in declining to devise a scheme, but with Congress which has made specific provision for protection of the government's prisoners but not for its soldiers.

We conclude that in the present case, while the federal government has obvious interests in the welfare of the parties to the litigation, its interest in the *outcome* of the litigation, *i.e.*, in how the parties' welfares should be balanced, is as yet undetermined.<sup>15</sup> The teaching of *Wallis* and *Miree* is that before federal common law rules should be fashioned, the use of state law must pose a threat to an "identifiable" federal policy. *Wallis v. Pan American Petro-*

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<sup>14</sup> Plaintiffs contend that FIFRA (*see note 9 supra*) evinces a federal interest in regulation of herbicides sufficient to call into play the federal common law. But as this court has noted, FIFRA was not intended to preempt state law even with respect to those matters it specifically regulates. *Chemical Specialities Mfrs. Ass'n v. Lowery*, 452 F.2d 431 (2d Cir. 1971). It is certainly an insufficient basis for a displacement of the entire body of state product liability law.

<sup>15</sup> The large number of veterans claimed in the class does not reveal the content of a federal policy reconciling the competing interests, any more than does the possibility that the defendant companies would have to be liquidated to pay the claims of the class.



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*leum Corp.*, *supra*, 384 U.S. at 68, 86 S. Ct. at 1304; *Miree v. DeKalb County*, *supra*, 433 U.S. at 31-33, 97 S. Ct. at 2494, 2495. In the present litigation the federal policy is not yet identifiable. We conclude, therefore, that the district court erred in ruling that plaintiffs' claims were governed by federal common law. The order denying defendants' motion to dismiss for lack of subject matter jurisdiction is accordingly

*Reversed.*

FEINBERG, Chief Judge (dissenting):

This case presents us with a unique set of facts, parties, and pleadings. Many aspects of plaintiffs' case are troublesome, because plaintiffs seek unusual relief, both procedural and substantive, as to which I express no view. But the issue now before us is far narrower, and raises more familiar considerations. That issue is whether a federal district court has federal question jurisdiction over the action, see 28 U.S.C. § 1331(a), because the action arises under federal common law. I agree with District Judge Pratt that this case should be tried in federal court under rules of federal common law. I therefore dissent from the opinion of the majority.

That the present case is *sui generis*, and national in its proportions, is evident from the complaint itself. The defendants in this action are five of the largest chemical companies in the nation, all of which admittedly manufactured "Agent Orange," a defoliant, for use by our nation's armed forces in Vietnam between 1962 and 1971. Plaintiffs' suit is brought on behalf of veterans, living and dead, and their parents, wives, widows, orphans, and children, living, dead, and stillborn. Plaintiffs allege that the Agent Orange supplied by the defendants was "contaminated with . . . poly-

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chlorinated dibenzo-*p*-dioxins . . . and polychlorinated dibenzo furans . . . including 2,3,7,8-tetrachloro dibenzo-*p*-dioxin (. . . "Dioxin"), one of the most toxic substances ever developed by man." Plaintiffs further allege that as a result of exposure to Agent Orange, they incurred, or have suffered an increased risk of incurring, cancer, genetic damage, and an early death. Judge Pratt noted that the defendants are "facing aggregate claims which may eventually amount to billions of dollars." As the majority notes, the complaint identifies fifteen groups of plaintiffs, totalling over 800 plaintiffs who, we are told, have filed complaints in 25 judicial districts all across the country. By this time it is probable that 30 to 40 districts are affected, since additional plaintiffs appear daily; plaintiffs' counsel assures us that many more complaints would already have been filed, but for the request of Judge Pratt not to do so until the question of class certification has been resolved. How many plaintiffs will ultimately come forward is unclear. Present plaintiffs assert that as many as 2,400,000 men and women who served in the armed forces could be eligible to sue defendants—not to mention their parents, dependents, and dead or stillborn children. The national dimensions of the case as pleaded are too obvious to escape notice. Identical complaints have been filed, *inter alia*, in Massachusetts and California, in Illinois and Texas, and we are informed that the Judicial Panel on Multidistrict Litigation has ordered all Agent Orange cases consolidated before Judge Pratt. The plaintiffs in these cases complain of injuries sustained as the result of service in our nation's military, in a national endeavor in a foreign land. To the non-legal mind, it would be an odd proposition indeed that this litigation, so patently of national scope and concern, should not be tried in federal court.

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As for the legal mind, all involved in this case—the parties, Judge Pratt, and the panel on appeal—appear to agree that federal question jurisdiction depends upon whether a federal common law rule of product liability should be applied. See *Illinois v. City of Milwaukee*, 406 U.S. 91, 98-101, 92 S. Ct. 1385, 1390-1391, 31 L. Ed. 2d 712 (1972); *Ivy Broadcasting Company v. American Telephone and Telegraph Company*, 391 F.2d 486, 492-93 (2d Cir. 1968). Whether a federal rule should be applied, in turn, depends on three factors, as discerned in *Miree v. DeKalb County*, 433 U.S. 25, 97 S. Ct. 2490, 53 L. Ed. 2d 557 (1977), and *Wallis v. Pan American Petroleum Corporation*, 384 U.S. 63, 86 S. Ct. 1301, 16 L. Ed. 2d 369 (1966):

- (1) the existence of a substantial federal interest in the outcome of the litigation;
- (2) the effect on this federal interest should state law be applied; and
- (3) the effect on state interests should state law be displaced by federal common law.

Judge Pratt, in his thorough and able opinion, analyzed all these factors and concluded that the fashioning of a federal common law rule was warranted on the facts of the present case. In a closely analogous case, *Owens v. Haas*, 601 F.2d 1242 (2d Cir.), cert. denied, 444 U.S. 980, 100 S. Ct. 483, 62 L. Ed. 2d 407 (1979), this court recently arrived at the same result. *Owens* is instructive because it represents the most recent examination by this court of the “federal interest” doctrine discussed in *Miree* and *Wallis*. A review of the *Owens* facts and holding shows that Judge Pratt’s analysis of the factors set forth above was correct.

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In *Owens*, plaintiff was a federal prisoner who was injured by county jail officials who were working under contract with the federal government. Plaintiff sued for damages as, *inter alia*, a third-party beneficiary of that contract. On that theory, the "first question" before this court was whether plaintiff's claims were "a matter of federal law or of state law"; the question was posed "both as a guide to contract interpretation and as an alternate basis for jurisdiction in the district court." 601 F.2d at 1248. Writing for the panel, the late Judge Smith noted that "the federal government owes a duty of reasonable care to safeguard the security of prisoners under its control," and discerned a "federal regulatory scheme" for maintaining the health and well-being of such prisoners. *Id.* at 1249. Judge Smith then concluded that this regulatory scheme generated "a federal interest in assuring uniform treatment of federal prisoners," *id.*, and that that interest, combined with the government's duty of reasonable care, meant that "federal rights and obligations [did] 'hinge on the outcome' of litigation in this area," *id.* at 1249-50. As a result, the court held that federal common law should apply.

Looking, as the *Owens* court did, to *Miree* and *Wallis*, the first question we must answer is whether the federal government has a "substantial interest" in the outcome of this litigation. It is plain that this question must be answered affirmatively. As the Supreme Court observed in *United States v. Standard Oil Company*, 332 U.S. 301, 67 S. Ct. 1604, 91 L. Ed. 2067 (1947),

Perhaps no relation between the Government and a citizen is more distinctively federal in character than that between it and members of its armed forces. To whatever extent state law may apply to govern the relations between soldiers or others

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in the armed forces and persons outside them or non-federal government agencies, the scope, nature, legal incidents and consequences of the relation between persons in service and the government are fundamentally derived from federal sources and governed by federal authority. See *Tarble's Case*, 80 U.S. 397, 13 Wall. 397, 20 L. Ed. 597; *Kurtz v. Moffitt*, 115 U.S. 487, 6 S. Ct. 148, 29 L. Ed. 458. So also we think are interferences with that relationship such as the facts of this case involve. For, as the Federal Government has the exclusive power to establish and define the relationship by virtue of its military and other powers, equally clearly it has power in execution of the same functions to protect the relation once formed from harms inflicted by others.

*Id.* 332 U.S. at 305-06, 67 S. Ct. at 1606-1607 (footnotes omitted). This obviously federal relationship does not depend primarily upon any particular statute, but rather inheres in the federal government's exclusive capacity to wage war. But in the case before us this relationship can also be analyzed in terms of *Owens*. In *Owens*, the federal government was found to owe "a duty of reasonable care" to federal prisoners, a duty stemming from statutory enactment, specifically 18 U.S.C. § 4042.<sup>1</sup> Similarly, the federal government here is under a statutory obligation to provide "an improved and uniform program of medical . . . care for members [of the uniformed services] and certain former members of those services, and for their dependents." 10

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<sup>1</sup> 18 U.S.C. § 4042 provides, in pertinent part, that the "Bureau of Prisons . . . shall . . . provide for the safekeeping, care, . . . subsistence, . . . [and] protection . . . of all persons charged with or convicted of offenses against the United States . . . ."

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U.S.C. § 1071. Further, in *Owens* this court discerned in "the scheme of regulation of federal prisons [an indication of] congressional intent to provide some general protections for federal prisoners." 601 F.2d at 1249. Similarly, in the present case there is a statutory scheme to provide "general protections" for members and veterans of the uniformed services. See 10 U.S.C. §§ 1071-87 (program of medical care for members of uniformed services and dependents); 38 U.S.C. §§ 310-15 (schedule of compensation to veterans and dependents for wartime disabilities); §§ 321-22 (schedule of compensation to survivors of veterans for wartime death); §§ 331-35 (same, peacetime disabilities); §§ 341-42 (same, peacetime death); 50 U.S.C. App. § 454(a) (requiring adequate provision of shelter, sanitary facilities, water supplies, heating and lighting arrangements, medical care, and hospital accommodations before persons can be inducted into military service). See also the various regulations governing the welfare of soldiers, all of which are, of course, promulgated under authority granted by Congress. 10 U.S.C. § 121 (President's power to prescribe regulations); § 3012(g) (Secretary of Army's power to prescribe regulations).<sup>2</sup> The Secretary of the Army is re-

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<sup>2</sup> E. g., Army Regulation 40-2, Army Medical Treatment Facilities, General Administration (effective April 1, 1978) (requiring provision of highest quality of patient care to soldiers in Army medical facilities); Army Regulation 40-3, Medical, Dental, and Veterinary Care (effective December 1, 1977) (providing standards of policy, eligibility, treatment, and administration, inter alia, in Army medical facilities); Army Regulation 32-15, Clothing and Textile Materiel, Classification and Inspection (effective October 1, 1976) (providing minimal standards for serviceability of clothing of Army personnel); Army Regulation 210-16, Bachelor Housing Management (effective September 15, 1975) (providing minimal standards of adequacy for quarters of certain Army personnel); Army Regulation 30-1, Army

(footnote continued on following page)

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quired by statute to be responsible for the "welfare, preparedness, and effectiveness of the Army." 10 U.S.C. § 3012(b)(1).

The majority concludes that on the facts of this case "there is no federal interest in uniformity for its own sake," and that there is no federal "substantive interest in the content of the rules to be applied." I disagree on both counts. As to uniformity of treatment, this court noted in *Owens* that "[b]ecause there is a federal regulatory scheme, there is a federal interest in assuring uniform treatment of federal prisoners." 601 F.2d at 1249. It is anomalous for this court to hold, on the one hand, that the federal government has an interest in "uniform treatment" of its *prisoners* sufficient to warrant the use of a federal rule of recovery, and, on the other hand, that the federal government has no such interest in "uniform treatment" of its *soldiers*. The majority suggests that the anomaly here lies "with Congress, which has made specific provisions for the protection of the government's prisoners but not for its soldiers." But a review of the statutory and regulatory provisions cited above, especially 10 U.S.C. §§ 1071-87 (medical care), § 3012(b)(1) (Secretary of Army's responsibility for "welfare" of Army personnel), and 38 U.S.C. §§ 310-15, 321-22, 331-35, 341-42 (veterans' and survivors' compensation), as well as myriad detailed Army Regulations, demonstrates beyond doubt that Congress has made specific provisions for the protection of its soldiers, both directly and by delegation.

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(footnote continued from preceding page)

Food Service Program (effective July 1, 1977) (providing standards for food and food services for Army personnel); Army Regulation 28-1, Army Morale Support Activities (effective February 15, 1979) (providing programs for maintenance of morale, esprit, mental and physical fitness, and combat readiness of Army personnel).



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The majority also concludes that because the government has arguably conflicting substantive interests in the outcome of the litigation, "the federal policy is not yet identifiable." The allegedly conflicting federal interests are in the welfare of veterans and in the welfare of suppliers of war materiel. But that the plaintiff veterans and the defendant contractors have opposing interests in this litigation hardly means that the paramount federal interest is somehow divided or self-contradictory. The United States has a clear interest in the protection of its soldiers from harm caused by defective war materiel. What other interests does the United States arguable have that might conflict with this clear interest? One such interest might be in seeing that defendants, as suppliers of war materiel, are treated fairly. But that interest cannot be said to conflict with the government's interest in the safety of its soldiers. Another such interest might be in preventing defendants from being driven to bankruptcy by large damage awards to Agent Orange plaintiffs, who have already made claims assertedly greater than defendants' combined liquid assets. This, I take it, is what the majority means by its reference to the federal interest in the "welfare" of defendants. But this interest lies in the future, and in the realm of speculation. There will be time enough to deal with the potential impact of defendants' financial liability if and when they incur any, if it is truly in the interest of the United States to do so. By contrast, plaintiffs' injuries—assuming for the moment that plaintiffs have a viable cause of action—lie in large part in the present, and in the realm of the concrete. The conclusion seems inescapable to me that the United States' interest in the "welfare" of defendants cannot approach, either in magnitude or in quality, its interest in the welfare of the Agent Orange plaintiffs. In short, in the case before us the paramount



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interests of the United States are in the welfare of its veterans and in their fair and uniform treatment.

Having discerned a significant federal interest, we are next required to determine whether or not a "significant conflict" exists between that interest and the application of state law. This factor is not reached by the majority. But that such a conflict does exist in the present case can hardly be disputed. Given the "distinctively federal" character of the relationship between the federal government and its soldiers, there is an inherent federal interest in the uniform definition of the aspects of that relationship involved in this case. As noted earlier, this inherent interest in uniformity was observed by this court in *Owens*, 601 F.2d at 1249. The application of state law to the present case would severely frustrate this federal interest: If state law is applied in the present litigation, and assuming again that the allegations in the complaint are true, then veterans may well be subjected to sharply differing rules of law in the pursuit of their remedies. For example, the law of the various states is in flux, diverging widely in the definition of what constitutes a "defective" product—especially with respect to defectively designed products—and in the availability of defenses based on the "state of the art" and technological feasibility. See United States Department of Commerce, Interagency Task Force on Product Liability, Product Liability: Final Report II-6-10 (1977) (varying state law respecting "defectiveness," especially in design-defect cases); *id.* at II-11-12 (same, respecting defense of "state of the art"). As a result, if the laws of 30 or 40 state jurisdictions are separately applied, veterans' recoveries for Agent Orange injuries will vary widely—despite the fact that these soldiers fought shoulder to shoulder, without regard to state citizenship, in a national endeavor abroad. In sum, the federal in-

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terest here in uniformity would be defeated by the application of discrete and differing state laws. It is thus not necessary to reach the question whether the other federal interest present in this case—in seeing that soldiers are not harmed by defective war materiel—would be frustrated by the application of state law. Because the federal interest in uniformity would be defeated by such an application, I conclude that the first two requirements of *Miree* and *Wallis*, as interpreted by this court in *Owens*, are satisfied, as Judge Pratt concluded.

The third and last factor involves the extent to which state interests would be affected, if state law were to be “displaced” by federal common law in the present case. This factor is also not reached by the majority. I agree with Judge Pratt’s conclusion that the claims made by Plaintiffs in this unique and unprecedented litigation do not fall within the developed area of state tort law. As noted above, the states’ product liability law is in flux; with respect to a case as novel as the one before us, a consistent and established body of state law is even less discernible. Accordingly, I think that Judge Pratt was correct in holding that the application of federal common law to the case before us would not “displace” state law, because there is no substantial body of state law on this point to be displaced. I thus conclude that all three factors, accepted by the majority as the proper analytical framework, point to the use of a federal common law rule in the present case, giving rise to federal question jurisdiction.

Because I conclude that the district court does have jurisdiction over the case before us, I dissent from the opinion of the majority.

**Excerpts From Pretrial Conference of  
December 12, 1983**

UNITED STATES OF AMERICA

EASTERN DISTRICT OF NEW YORK

MDL No. 381

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In re:

"AGENT ORANGE"

PRODUCT LIABILITY LITIGATION

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United States Courthouse  
Brooklyn, New York  
December 12, 1983  
1:00 p.m.

**Before:**

HONORABLE JACK B. WEINSTEIN,  
*Chief U.S.D.J.*

HENRY SHAPIRO  
ILENE GINSBERG  
HARRY RAPAPORT  
Official Court Reporters

\* \* \*

[The Court:] Is there anything else on page three?  
Page four?

Mr. Gordon: On page four, your Honor, there is a deletion, which I am sure is deliberate, which I would like to discuss, that was paragraph four of defendant's proposed

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notice, which was the provision for identifying representative plaintiffs and also stating the nature of their claims, and that there has been no determination as to the adequacy or typicality.

We are quite concerned that the Court can issue a classification order, and authorize the notice where as yet, there has been no determination as to adequacy or typicality, and in fact, as of today, we have not obtained a list of the full represented plaintiffs in the class.

I don't think the Court can do that. If the Court is going to insist on certifying a notice before that is done, I think that there—

Special Master: Excuse me, your Honor?

Mr. Gordon: It's an important provision which is not incorporated.

Special Master: Your Honor, it is assumed that this order will not go out until (b) (3) is filed with the Court.

The Court: Until what?

Special Master: Until your opinion finding (b)(3) your Honor.

The Court: The position of the defendants is that I have not really had the information necessary to make that determination.

Isn't that it?

Mr. Gordon: That's absolutely correct, and let me give you an example, your Honor.

In the first five names we have received from the plaintiff, I believe there were three cancer cases. I am not familiar with the other two claims.

But at various times, plaintiffs have claimed a wide range of injuries, such as porphyria, cutanea and tarda, various other liver illnesses, heart problems, impotence, a whole plethora of ailments.

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And if there are no representative plaintiffs with that particular ailment, they cannot represent a class member who had that ailment, who believes it was caused by Agent Orange.

This is an important problem, and I believe we should ascertain a full profile of each of the representative claimants, and find out if there are complaints outstanding, or which indicates there is an area not being represented.

And I think that should be disclosed to the class notice.

Mr. Dean: Your Honor, adequacy and typicality has been decided in September of 1980, as well as by your Honor. Those are precedents before class certification under (b) (3) or (b) (1) (a) or (b) (1) (b).

Those four elements, of which adequacy and typicality are included, must be resolved in favor of the petitioning parties, before your Honor makes a determination with regard to the type of class that it is.

So we say when Mr.—when the lawyer from Diamond Shamrock indicates that adequacy and typicality must be the test for the representative claimant, I am not persuaded it is right, and I don't believe that is the law.

Mr. Gordon: I would further point back to Judge Pratt's original decision, where he indicated his intention to certify the b(3) class. He indicated at some point in the future, a formal complaint would be served which listed the representatives of the plaintiffs.

And I might add, at this point, there is no class complaint as that term is usually understood in this litigation.

There is no action which we are proceeding in right now. This is an MDL proceeding. There is no particular action in which findings are being made.

There is no complaint that a claimant can't come in and look at, to see if his complaint is covered, your Honor.

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The Court: What I would suggest, to meet the problem, is we add a sentence such as this at the end of paragraph four on page four of the notice: The Court may reconsider this decision de-certifying, modifying the definition of the class or creating subclasses in the light of future developments in the case.

Mr. Gordon: That would be better than nothing, your Honor.

I might request, and I will request, that you add qualifying language, for instance, specifically to adequacy and typicality, with class representatives.

The Court: I don't think it's necessary to specify further.

Special Master: Your Honor, the period is '61 to '72 again.

The Court: Thank you.

Mr. Dean: We have no objection to your Honor's language. Your Honor is empowered to do that anyway, and we, of course, recognize that.

The Court: Anything further on page four?

Page five?

Is there anything on page five?

Mr. Gordon: May I interrupt for one moment?

The Court: Yes.

Mr. Gordon: Again, on the issue of class representatives, is there going to be time set aside by the Court to concentrate on adequacy and typicality?

The Court: Once you know something about it, I will entertain a motion if you make one.

We have to move ahead with this now. I cannot wait until every loose end is tied up.

Mr. Silberman: I don't know if it's an appropriate time, your Honor, to raise the question, and it probably isn't, but at some point we probably should get clarification as to

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what your Honor has in mind when he speaks about plaintiffs, the representative plaintiffs.

There is obviously confusion. Frankly, I don't know what representative plaintiffs are now, particularly when I see in the first five names, there are three cancer cases.

The Court: I hope, and we will have to see what they come up with, that these plaintiffs will cover the spectrum of their claims. So that the jury will be able to tell by rejecting some of these claims, if that's what they do, that the whole class, let's say of fetal defects are not caused. And if they come in with fetal defect representative plaintiff, and there's a finding against that, there has to be some inquiries and a lot of interrogatories, I believe, and then there will be no fetal defect cases in the class.

I take it that the typical claims they have selected, include the relatively modest claims, ranging to the very severe.

Mr. Pakula: That's not correct, your Honor.

Mr. Dean: There are no relatively modest claims, but there are claims of basic chloracne, and from that, claims involving cancer deaths and children with birth defects.

Mr. Krohley: I received a list of 11 so-called representative plaintiffs a few minutes ago, and from my quick count, five have cancers.

By this, I don't think the plaintiffs wish to say that fifty percent or so of the entire class suffers from some form of cancer.

The Court: If they don't put in a claim, let's assume the claim is for tingling fingers—

Mr. Krohley: There are tingling claims in here, your Honor.

The Court: Then tingling claims are out.

Mr. Krohley: I agree with what your Honor said.

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But I think the more fundamental point here is that we are misleading the trier of fact. I think we are misleading a jury.

If the jury thinks that these ten people or eleven people have representative illnesses, and they get the impression that fifty percent have some form of cancer, I think there is a gross misrepresentation of the plaintiffs' class.

The Court: I will explain that, I and I am sure you will. Alan, make a note of this.

I want to give the jury a preliminary charge. I will put that in the preliminary charge, and you can make the point to them. I don't see how we can avoid that problem.

Mr. Krohley: I think the problem has been created where we are calling representatives people as to whom no determination has been made, as to whether they are representatives.

That's not in terms of what they have, but in terms of their exposures, or length of exposures, and whatever possibilities in the world are, for causing these illnesses.

The Court: I will look through what they have in the trial.

And if the only thing we have in the case is if there is a recovery—and this is for purposes of illustration—that there is somebody who drank this stuff in order to get some kick out of it, and that's the only person who had any damage that was proved here, then those are the only people who will recover from the class.

The only persons they put in are people who are actually dispensing the material by hand, or from an airplane, then everybody else is not going to be able to recover.

If the only people they have are people that were dumped upon when they had to dump the stuff quickly in order to escape from attack from the North Vietnamese and there-



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fore, these people took a bath in it, then that's all they are going to get.

So their choice of plaintiffs, and what they are going to show here, is going to ultimately determine if they are successful at all, is the kind of people who are going to be able to recover ultimately in the case.

Mr. Krohley: Your Honor, assuming that we tried all eleven of these cases in May through September, the defendants win every single one, the other side having a class action have the protection of the binding result.

If we are successful proving his case was not related to a disease, that he was in Viet Nam for six months, exposed to Agent Orange, for two weeks, what binding effect will that have upon Mr. X in the class who was in Viet Nam for 11 months and exposed for six months to a great deal more of the spray?

The Court: The plaintiffs will have to take these problems into account in choosing their cases. I do not see how else we can proceed. We could have 200 cases and we'd get a better sampling. I cannot expect to have a jury keep two hundred cases in mind.

Mr. Krohley: The defendants have no input on the selection of the 11 individuals.

The Court: How could you, naturally.

Mr. Krohley: I think the plaintiffs ought to come forward and show us a profile of their class members.

The Court: They cannot, because they have told us that they do not know it.

Mr. Krohley: The answer to that is not to certify a class. Are they representative or just 11 people—

The Court: You will go through it and I will hear you further on. It may well be that they do not have a class. I do not know what they have.

*Pretrial Conference—December 12, 1983*

Mr. Gordon: It's fine to use a charge to indicate to the jury that the ten claims in front of them are not representative of the entire class—

The Court: I am not—

Mr. Gordon: Shouldn't something be done before a class notification goes out to 120,000 people on the Agent Orange registry, before you broadcast the case to the 50 states, Australia and New Zealand, when half will not be part of the class at all?

Mr. Dean: How is that, that half may not be part of the class? We have anguished over the selection of the names. We are aware it is a two-edged sword. We are very aware of that. When the defendants say, "We'd like to select your plaintiffs," we have a little difficulty respectfully.

The Court: We have a problem here. I understand that both sides have a problem. The Court has a problem. We have an enormous case where we have to come to grips with it. This is the way I have decided that we should do it and this is the way we are going to do it. As we proceed, if there are special problems with particular plaintiffs you will bring them to my attention. That is one of the reasons I was anxious to get the names and the information to you as quickly as we can. We'll be meeting regularly and I will be happy to hear you on any problem and further limitation on the class—

Mr. Krohley: The thing—the practical problem that we have here—and I know it is something that your honor will not consider. We do not have the time between now and May to do what I am suggesting.

However, what I am suggesting is that I think it is not even a close case. There is no way that this case should proceed as a class action until the determinations have been made that there are representative plaintiffs. It is the reason why mass tort litigation proceeds as a class—

*Pretrial Conference—December 12, 1983*

The Court: I do not know the profite of these people yet. Maybe you do, but I do not. When you get something on them, we will sit down and go through them and see how they fit in.

Mr. Krohley: I will make an effort to do that in the next week. May I ask the Court to hold off on certifying this class for one week?

The Court: I have to move ahead on this. This certification has been kicking over for too long.

Mr. Gordon: May I raise another problem concerning the advocacy of representatives. In the event we send out the notice and move along a month or two months from now, and it turns out that the representative plaintiffs are not representative of very many people, we will proceed to trial and the class will be changed. It will concern only to the other claimants. The people have already received cancer cases or whatever. The class will be decertified as the notice will not know what has happened. They will continue to rely on the class action that does not include them anymore, while the statute of limitation will begin to toll—toll and will expire. There is a very serious danger to prejudice those who are later cut of the class, because we have not made this determination—

The Court: That is the nature of life. We proceed as best we can with the information available and then we modify our decision. We try to take care of these problems. We are trying to get the names and addresses of these people, to give them to the extent that we can. We will do the best we can, but in the meantime, life is moving on. The veterans are dying, not necessarily because of Agent Orange. I am not saying that that is the reason. We cannot wait indefinitely.

**Affidavit of Edwin R. Matthews**

**UNITED STATES DISTRICT COURT**

**EASTERN DISTRICT OF NEW YORK**

**MDL # 381**

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**IN RE**

**"AGENT ORANGE"**

**PRODUCT LIABILITY LITIGATION**

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STATE OF NEW JERSEY )  
COUNTY OF ESSEX ) ss.

**AFFIDAVIT**

I am an attorney associated with the law firm of Budd, Lerner, Kent, Gross, Picillo & Rosenbaum.

1. In order to determine if it is possible to give "individual notice to all members of the broad class to be certified", I have conducted an investigation in conjunction with other personnel in this office and another law firm. Based on information developed during the course of this investigation, the following summation is made to the court.

2. The Veterans Administration maintains a computerized listing of all veterans who were discharged after 1973. This computerized data system, known as VADS, an acronym for the Veterans Administration Data System, is located in Austin, Texas. This system allows for a listing of all Vietnam veterans discharged after 1973.

3. Prior to the establishment of the VADS system there does not appear to have been a centralized computerized

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repository within the Veterans Administration for data relating to discharged American servicemen. Prior to that date, when a person was separated from the military, a copy of his military discharge papers (Form DD214) was provided, as a matter of course, to the Veterans Administration by the Department of Defense. This form was given to the VA within one week of the serviceman's discharge and resulted in a computerized form letter being sent by the VA to the discharged serviceman within 10 days of that separation date. A follow-up letter would be sent 6 to 8 weeks later. Although we were advised that the Form DD214 would be forwarded from the Veterans Administration Headquarters to the 58 regional VA centers, it is apparent that, with the exception of veterans who have active files at the regional centers, who came from educationally deprived backgrounds or who had suffered physical impairment as a result of the Vietnam conflict that these forms are not maintained at the regional headquarters.

4. Copies of all discharge documents (DD214) from 1912 to the present were sent in the normal course of business to the National Military Personnel Center in St. Louis, Missouri. This repository also houses formerly active files, which were retired by the regional centers in the regular course of their business.

5. The Veterans Administration currently maintains an Agent Orange registry. Approximately 33,000 names and addresses have been compiled in this registry with 20-25,000 of those names and current addresses entered into a computer.

6. As indicated above, the National Military Personnel Center in St. Louis is the repository for most of the Army, Air Force, Navy and Marine Corps records for personnel

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separated, discharged, or retired from active duty. Although there was a major fire at this storage facility in 1973, we have been assured by custodial personnel from both the Army and Navy sections of this facility that only records from the period 1912 to 1959 were affected. We were assured that all documents pertaining to veterans discharged from 1962 to 1971 were extant and housed at the St. Louis facility. While it appears to be the government's position that the information contained in these records "is not feasibly machine retrievable" as indicated in the letter of Joan Bernott of January 27, 1981, it is nevertheless clear that a file-by-file review could identify all records maintained at the facility pertaining to individuals who served in Vietnam. It was learned during the course of our investigation that the State of Illinois had assigned a person on a full-time basis to identify those individuals from Illinois who had served in the Army in Vietnam. In less than two years time, this single individual was able to compile such a list. It would thus appear that, if a large number of personnel were assigned by the plaintiffs to this task, they would feasibly be able to accomplish it in a reasonable period of time. For example, if 24 people were assigned full time to the same task, they should be able to accomplish it within one month's time.

7. Contact was made with the Department of Personnel Centers for the Army, Air Force, Navy and Marine Corps. Each of these centers maintains the personnel records for members of their service currently on active duty. These records are computerized and include an individual's current military address. The Air Force and Marine Corps centers advised us that it was technically feasible for them to generate a list of those officers and enlisted personnel currently on active duty who had served in Vietnam at some time in

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their career. The Army indicated that it was able to generate such a list for its officers corps., but was uncertain that such information could be generated for Army enlisted personnel on active duty today. Although there were some indications that the Navy would be able to provide a list of active duty personnel assigned to land stations in Vietnam, a different division of the Navy Personnel Center indicated that this could not be done. The Marine Center estimated that of the approximately 190,000 Marines currently on active duty, 50,000 of them served in Vietnam. The other services could provide us with no similar estimates. It is apparently possible for all of the military services to forward through the normal chain of command a request for a list of the names, current addresses, and dates of service in Vietnam; within a reasonably short period of time (30 to 60 days at most) they would be able to compile an updated list.

Each of the services maintains active duty and inactive reserve personnel records. The Air Force Reserve Records Center in Denver, Colorado estimated that from their data base of approximately 417,000 personnel, they could generate a list of 50,000 to 80,000 names and current addresses of people who had served in Vietnam. This list could be generated fairly quickly for a minimal cost (under \$500). Navy retired and reserve records are located in New Orleans. That office advises us that they could generate a list of approximately 134,000 officers and enlisted personnel who served in Vietnam at a cost of between one and two thousand dollars. The Marine Reserve records apparently mirror those of their active duty personnel system. Army Reserve records are maintained in St. Louis and pertain to approximately 800,000 personnel, of whom approximately 10% served during the Vietnam era. They indicated that it is



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possible to identify those who actually served in Vietnam by identifying those who served during the relevant time period, with a file-by-file search being needed to identify those who actually served in Vietnam.

8. Although the records maintained by the Veterans Administration, the National Military Personnel Center, and the Reserve Personnel Centers will normally contain addresses accurate at the time of separation from active duty, it is possible that in a number of cases these records have been updated from time-to-time. For example, reserve personnel on pay status would generally have a current address on file.

9. A list of all Air Force, Army and Marine units stationed in Vietnam during the Vietnam conflict can be identified. Each of these units would have maintained a list of names of personnel and service/social security numbers of those people who were assigned to their unit. It may be possible by going back and reviewing the unit diaries or morning reports for these units to obtain the names of men who served in these units in Vietnam.

10. As part of our investigation, state agencies within the 50 states and associated territories were contacted to ascertain whether any records were maintained which could be of assistance in identifying Vietnam veterans. Approximately 20 states paid cash bonuses to their Vietnam veterans. The State of Illinois, Louisiana, Michigan, Missouri, North Dakota, Pennsylvania, Washington and Wisconsin advised us that they can provide lists of approximately 600,000 veterans who served in Vietnam. 13 other states have some records of Vietnam veterans receiving bonuses. In order to identify those veterans who served in Vietnam, the base document in these records would have to be looked



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at individually. In almost all cases, this document is, once again, the Defense Department Form DD214. These states indicate that approximately 5 to 75,000 documents would have to be reviewed to determine the names of those who had served in Vietnam.

11. Our investigation included contacting 35 of the 68 private veteran organizations listed in the Veterans Administration 1980-81 directory of *Veteran Service Organizations and State Department of Veteran Affairs*. Included among these were the American Legion, Veterans of Foreign Wars, Disabled American Veterans, Catholic War Veterans, Jewish War Veterans, Reserve Officers Association of the United States, Fleet Reserve Association and the National Guard Association. While most of these organizations maintain lists of their members, none could specifically identify those members who served in Vietnam. For example, the American Legion lists 2.7 million members. Of that total, 750,000 are Vietnam-era veterans, that is, veterans who served during the time of the Vietnam conflict but not necessarily in Vietnam. The membership lists of these organizations could be used to update addresses provided by the Department of Defense or the Veterans Administration.

12. Finally, although we did not contact any of the following organizations as part of our investigation, it is clear that there are a number of Veterans Groups formed specifically around the Agent Orange issue or which have taken an active interest in the issue. These organizations maintain membership lists which probably have already been made available to the plaintiffs. Among them are the following: (1) National Veterans Task Force on Agent Orange; (2) Agent Orange Victims International; (3) Vietnam Veterans/Vietnam Victims; (4) Vietnam Veterans Against The

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War; (5) Citizen Soldier; (6) Vietnam Veterans of America; (7) CAVEAT; and (8) The National Veterans Law Center.

13. Thus, notwithstanding the position taken by the government in the letter of Joan Bernott of January 27, 1981, it appears that the names and addresses are retrievable from government records. It would seem appropriate that at the very least the plaintiffs and defendants ought to be entitled to conduct discovery of government personnel in order to determine precisely what information would be available for use in making this notification.

/s/ EDWIN R. MATTHEWS  
EDWIN R. MATTHEWS

Sworn to before me this 29th day of January, 1981.

/s/ LEON B. PIECHTER  
Attorney at Law State of New Jersey

**28 U.S.C. § 1407. Multidistrict Litigation**

(a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: *Provided, however,* That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

**Federal Rules of Civil Procedure, Rule 23****CLASS ACTIONS**

(a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any

*Federal Rules of Civil Procedure, Rule 23*

questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undersirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

*(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.*

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires enter an appearance through his counsel.

*Federal Rules of Civil Procedure, Rule 23*

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include any specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

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